DOCUMENT RESUME

ED 364 014 EC 302 583

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TITLE	Section 504. Guidelines for Educators.
INSTITUTION	Montana State Dept. of Public Instruction, Helena.
PUB DATE	Oct 92
NOTE	119p.
PUB TYPE	Guides - Non-Classroom Use (055)
EDRS PRICE	MF01/PC05 Plus Postage.
DESCRIPTORS	Accessibility (for Disabled); Attention Deficit Disorders; *Compliance (Legal); *Disabilities; Due Process; Educational Legislation; Elementary Secondary Education; *Eligibility; *Federal Legislation; Hyperactivity; *Legal Responsibility; Regular and Special Education Relationship; Rehabilitation; Residential Programs; School Responsibility; State School District Relationship; Student Evaluation; Student Placement; Transportation
IDENTIFIERS	Individuals with Disabilities Education Act; *Montana; *Rehabilitation Act 1973 (Section 504)

ABSTRACT

This manual, developed in Montana, is intended to assist schools in complying with Section 504 of the Rehabilitation Act of 1973 which requires the provision of services to people with disabilities in a nondiscriminatory manner. The first section provides an introduction to Section 504, noting that some students not covered by the Individuals with Disabilities Education Act (IDEA) may be covered under Section 504. The second section examines school district responsibilities under the law, including written assurance of nondiscrimination, designation of a compliance coordinator, grievance procedures, and procedural safeguards. Eligibility procedures under Section 504 for receiving a free appropriate public education are considered next, including referral, Section 504 student determination, evaluation procedures, the individualized program, placement, reevaluation, and procedural safeguards. A Section 504 policy/procedures checklist is attached. The fourth section looks at special issues including transportation, residential placement, nonacademic services, program accessibility, students with special health care needs, students with attention deficit hyperactivity disorder, and funding. Definitions of key terms in the law and a variety of sample forms to be used by schools are also provided. Appendices contain: (1) the text of Section 504 as amended in 1990; (2) memoranda from the Office of Civil Rights regarding substance abuse, distinctions between Section 504 and IDEA, and attention deficit hyperactivity disorder; (3) a systematic comparison of IDEA, Section 504, and the Americans with Disabilities Act; and (4) additional resources. (DB)

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SECTION 504

GUIDELINES FOR EDUCATORS

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MONTANA OFFICE OF PUBLIC INSTRUCTION
NANCY KEENAN, SUPERINTENDENT

A Message from the Montana Superintendent of Public Instruction

Section 504 of the Rehabilitation Act of 1973 has been with us for more than two decades. While Montana schools have known of their obligation to provide education in a nondiscriminatory manner, schools have had minimal contact with its specific requirements since most of their energy has been directed toward providing special education services for those students with disabilities eligible under IDEA. However, advocacy organizations, parents and students have been increasingly looking to the requirements of Section 504 to ensure that the education system provides the full range of special accommodations and services necessary for students with special needs to participate in and benefit from education programs including nonacademic activities.

This manual has been developed to provide schools with assistance in meeting the requirements of Section 504. It is our hope that the manual is "user friendly," that it provides practical advice as well as "camera ready" sample policies and forms to assist school personnel in carrying out the requirements of Section 504.

We are committed to providing an equitable educational opportunity to all students in Montana's public schools. This publication should assist teachers and administrators in meeting the educational needs of a diverse student population.

Nancy Keenan

October 1992

Acknowledgments

This manual was developed under contract by Dr. Mary Susan Fishbaugh, Professor of Special Education, Eastern Montana College. The Office of Public Instruction extends its appreciation to Dr. Fishbaugh for her authorship, time and contributions.

The Office of Public Instruction also extends its appreciation to Sue Paulson for editorial review and to field reviewers for their time in meetings and review of the document to make recommendations and edits.

Information in this manual has been taken from Student Access, Section 504 of the Rehabilitation Act of 1973. The Office of Public Instruction extends its appreciation to the Oregon Department of Education for permission in allowing use of the material.

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1.0 Introduction to Section 504

"No otherwise qualified individual with handicaps in the United States...shall, solely by reason of her/his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance under any program or activity conducted by any Executive agency or by the United States Postal Service." (29 USC 794)

This short paragraph has far reaching implications for school districts. School administrators in Montana have requested that the Office of Public Instruction (OPI) provide technical assistance to districts to assure compliance with the statute.

"Handicapped individuals" will hereafter be referred to as "individuals with disabilities" in order to be consistent with current educational terminology.

Section 504 of the Rehabilitation Act was enacted in 1973. Its implementing federal regulations promulgated in 1977 are divided into six sections:

Subpart A.	General Provisions
Subpart B.	Employment Practices
Subpart C.	Program Accessibility
Subpart D.	Preschool, Elementary, and Secondary Education Requirement
Subpart E.	Postsecondary Education Requirement
Subpart F.	Health, Welfare, and Social Services

For many years, the main thrust of enforcement has been in the area of employment for individuals with disabilities. However, within the last several years, the Office for Civil Rights (OCR), charged with enforcement of Section 504, has become more active in enforcement of the education of individuals with disabilities sections. Advocacy organizations, likewise, have increasingly focused on Section 504's requirements to ensure that the educational system provides the full range of special accommodations and services necessary for individuals with disabilities to participate in and benefit from public school education programs and activities. The following manual focuses upon the student issues, Subparts C and D of Section 504, and not upon Subpart B (employment practices), Subpart E or Subpart F.

The statute prohibits discrimination against individuals with disabilities, including students, parents, and staff members, by public school districts receiving federal financial assistance. All programs or activities of the school district receiving federal funds are covered by Section 504 regardless of whether the specific program or activity involved is a direct recipient of federal monies.

Included in the U.S. Department of Education regulations for Section 504 is the requirement that students with disabilities be provided with a free appropriate public education (FAPE). Regulations require child-find, evaluation, provision of appropriate program and procedural safeguards to qualified individuals with disabilities in public schools in the United States.

A. General Procedures: An Overview

If a district has reason to suspect that because of a disability a student needs either special accommodations or related services in the regular educational environment in order to have equally effective participation in the school program, the district must evaluate the student and develop and implement a plan for the delivery of all necessary educational modifications. Requirements for the evaluation and placement process are determined by the type of disability suspected and the type of services needed by the student. The evaluation must be sufficient to assess the nature and extent of the educational impact of the disability in order to determine appropriate educational services. Determination of what services are needed must be made by a group of persons knowledgeable about the student. Decisions about Section 504 eligibility and services must be documented in the student's file and reviewed periodically. A student's program must be provided in the least restrictive environment.

Under Section 504, parents or guardians must be provided with notice of any action that changes the identification, evaluation or placement of their child. Parents or guardians are entitled to an impartial due process hearing if they disagree with district decisions.

B. Relationship with IDEA

Section 504 and its implementing regulation 34 Code of Federal Regulations (CFR) 104, while intended to be consistent with the Individuals with Disabilities Education Act (IDEA), are more encompassing. All individuals who receive special education and related services under IDEA are also considered to be qualified individuals under Section 504. However, all individuals who qualify for Section 504 services may not qualify for special education under IDEA.

IDEA defines as eligible only students who have certain specified types of impairments and who, because of those conditions, need special education and related services. Section 504, on the other hand, includes all students with disabilities. These students are defined as having any physical or mental impairment that substantially limits one or more major life activities, including, but not limited to, learning. Section 504 covers all students who meet this definition, even if they do not fall within the IDEA enumerated categories and do not need special education.

SECTION 504 IMPACT ON STUDENT POPULATION

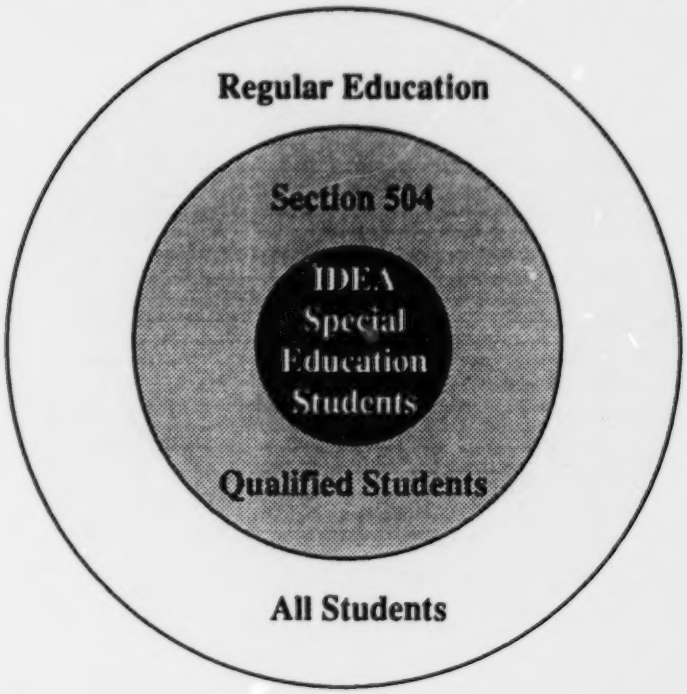

FIGURE 1—Based on conceptual model developed by Perry Zirkel

Section 504 regulations concerning provision of a free appropriate public education closely parallel requirements of IDEA. Individuals who qualify for Section 504 educational services may require an individualized, modified education program. The program must be based upon current evaluations and periodically reviewed. However, evaluations more limited than a comprehensive educational evaluation required by IDEA may be adequate.

Parents must receive notice of the proposed change in program or placement. By fulfilling responsibilities under IDEA, a district also meets Section 504 requirements. (See Appendix B for comparison.)

C. *Summary*

In summary, it is important to keep in mind that some students who have physical or mental impairments that substantially limit their ability to participate in the education program are entitled to protection under Section 504 even though they may not fall into IDEA categories and be covered by the special education law. It is also important to realize that Section 504 is a responsibility of the general education system and <u>not</u> the sole responsibility of special education.

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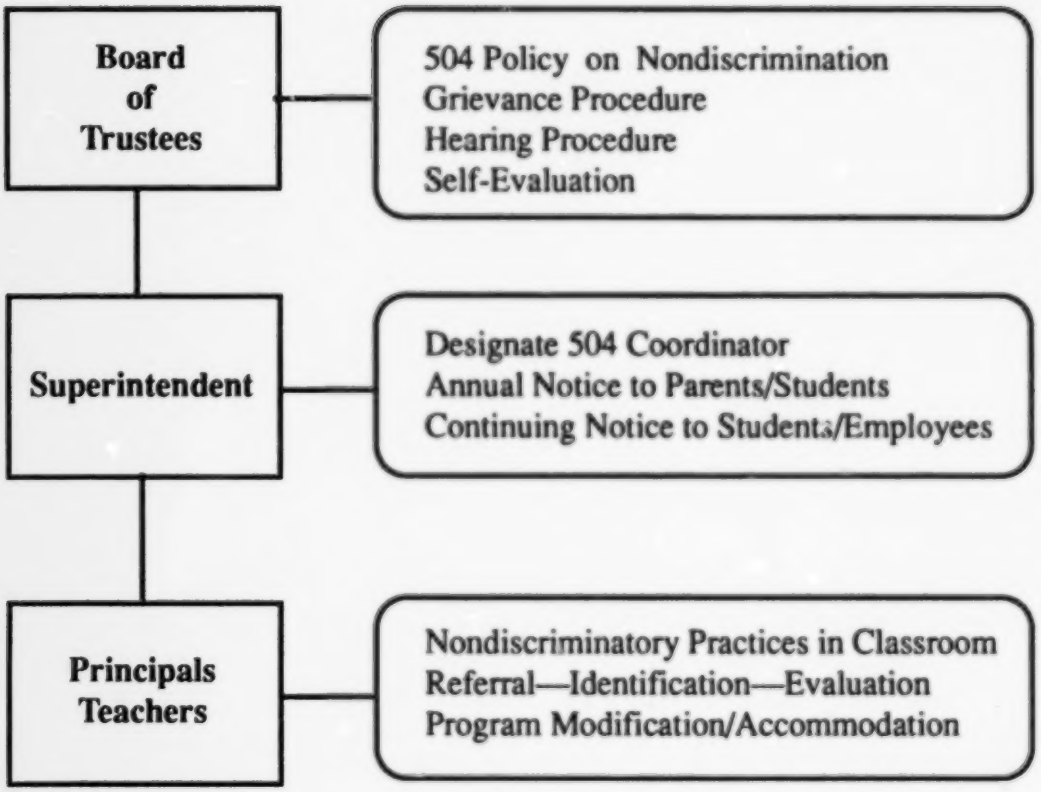

FIGURE 2

2.0 School District Responsibilities

In order to be in compliance with Section 504, a school district must implement the following procedures.

A. Written Assurance

Written assurance of nondiscrimination must be included in school board policy. Applications for federal grants also require written assurance of compliance with Section 504 on forms specified by the grant application. (34 Code of Federal Regulations 104.5)

In addition, the Montana Board of Public Education administrative rule 10.55.802 states:

> **"The school district shall not discriminate against any student on the basis of sex, race, marital status, national origin, or handicapping condition in any area of accreditation. This includes programs, facilities, textbooks curriculum, counseling, library services, and extracurricular activities. It is the purpose of the accreditation standards to guarantee equality of educational opportunity to each person regardless of sex, race, marital status, national origin, or handicapping condition."**

B. Compliance Coordinator

A Section 504 compliance coordinator must be designated if the school district employs more than 15 persons (34 CFR 104.7[a]). The compliance coordinator is responsible for ensuring the provisions of this section are implemented including grievance procedures and identification and evaluation procedures.

The Section 504 compliance coordinator position is analogous to that of a case manager. It is the coordinator's role to synchronize school personnel in their efforts to make reasonable modifications for qualified students. The coordinator should possess the following prerequisites:

- *knowledge of the law in order to resolve disputes;*
- *flexibility/creativity in order to suggest reasonable instructional accommodations;*
- *organizational skill in order to juggle responsibilities.*

C. *Notice*

Written notice that the school district does not discriminate on the basis of disability in violation of Section 504 must be provided to students, parents, employees, unions, and professional organizations (34 CFR 104.8).

(a) The notice shall include a statement of nondiscrimination by the district in admission to, access to, treatment in, or employment in its programs and activities and shall name the Section 504 Compliance Coordinator.

(b) The notice must be included on recruitment materials and publications containing general information such as the student handbook. For example, the district might include the notice on school calendars, in parent-student handbooks or school newsletters or posted on the public bulletin boards in each school building.

SAMPLE NOTICE

The_____district #_____ does not discriminate on the basis of disability in admission to, access to, treatment in, or employment in its programs and activities. The Section 504 Coordinator for the district is _____. To contact the coordinator for information or to file a grievance, please come to _____(location) or call _____(phone).

D. *Grievance Procedures*

The school district that employs fifteen or more persons must adopt written grievance procedures to resolve complaints of discrimination. Students, parents, or employees may file grievances (34 CFR 104.7[b]). A sample grievance procedure is on pages 25-29.

E. *Annual Notice and Identification of Students with Disabilities*

The school district is required to take appropriate steps to identify and locate every qualified individual living in the jurisdiction of the school district who has a disability and is of school age and is not receiving a public education. In addition, the school district is required to notify annually all individuals with disabilities and their parents or guardians of the school district's duty to provide a free appropriate education (34 CFR 104.32). A sample notice is on page 23.

F. *Procedural Safeguards*

Whenever a school district proposes to change the identification, evaluation or educational placement of a qualified individual, the parents or guardians must be provided with notice which includes the following procedural safeguards:

"Notice of their rights.
The opportunity to examine relevant records.
An impartial hearing with opportunity for participation by the parents or guardians of the qualified individual and representation by counsel.
A review procedure." (34 CFR 104.36)

A sample notice is found on page 24.

G. *Self-Evaluation*

The school district must have conducted a self-evaluation within one year of the date of implementation of the regulations (1977) and maintained for at least three years, a list of the interested persons consulted in the self-evaluation, a description of areas examined and any problems identified, and a description of any modifications made and of any remedial steps taken.

(NOTE EMPLOYMENT — Employment is beyond the scope of this manual. Employment regulations may be found in 34 CFR 104.3/104.11/104.12/104.13/104.14.)

BUILDING LEVEL RESPONSIBILITIES

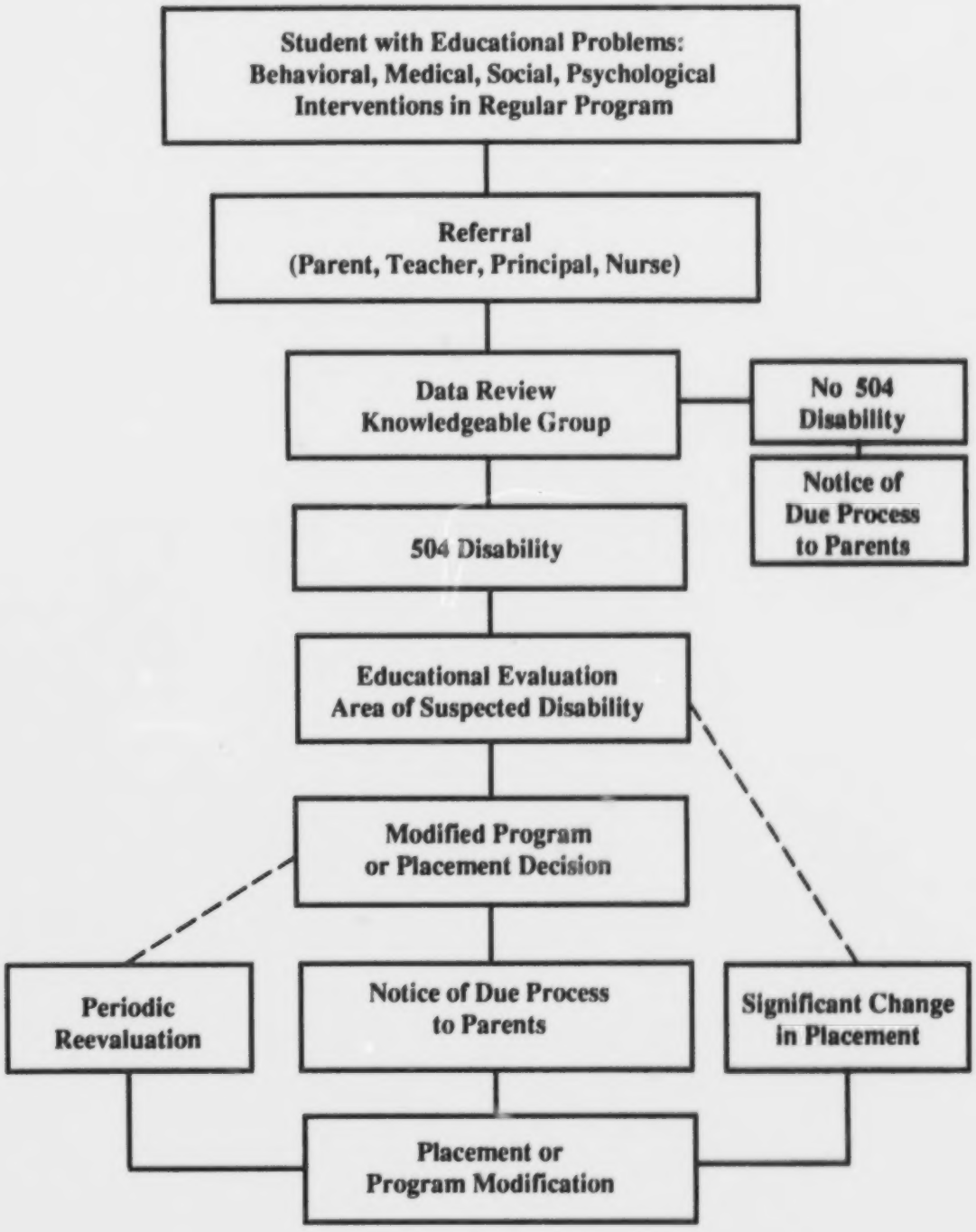

FIGURE 3

3.0 Eligibility Procedures for FAPE Under Section 504

Each school district must implement procedures to provide FAPE to eligible students. Minimum procedures include referral, evaluation, placement, reevaluation, and notice of due process rights.

A. Referral

Q. How does the district learn that a student may have a disability?

A. The school district may learn that a student has or may have a disability by:

parent report;
medical or health referral;
review of individual student discipline and academic records;
teacher observation; and
enrollment information from previous schools.

When the district receives such information, a Section 504 referral should be made.

B. 504 Student Determination

Q. How does a school district determine when a student is a qualified individual?

A. When the district learns that a student may have a disability, the district must decide whether the student is a qualified individual under Section 504. Therefore, the school district must have procedures for determining whether a student has a physical or mental impairment which substantially limits one or more major life activities. These procedures should include a review process and a decision point which answers the following questions:

(a) Does the student have a physical or mental impairment?
(b) Does the impairment affect a major life activity?

(1) If the referral provides evidence as to the possibility of a mental or physical impairment, the school district must proceed with a review of the student's current educational performance, medical and educational records and reports from parents, teachers and administrators to determine if further evaluation is necessary.

The determination of appropriate education for a qualified individual must be made by a group of persons knowledgeable about the (a) student's individual needs, (b) student's school history, (c) meaning of evaluation data, and (d) placement options. Depending upon the type of disability present, the persons at this meeting may include a school counselor, school psychologist or school nurse. Good sources of information include documentation of interventions in the regular classroom, discipline records, scores on group achievement tests and special health care plans.

(2) If the school district determines that the student does not have a physical or mental impairment which substantially limits one or more major life activities and takes no further action, the school district must ensure that parents or guardians are informed of their procedural due process rights.

C. *Evaluation*

Q. What are minimum evaluation procedures?

A. Once a school district determines that a student is a 504 qualified individual, the school must initiate its procedures for evaluation.

(1) At a minimum, evaluation procedures must ensure that:

- *all tests and assessments are validated and administered by qualified personnel according to instructions provided by the producer;*
- *tests are tailored to assess specific areas of educational need and not merely those which are designed to provide a single intelligence quotient;*
- *tests measure student's ability and do not reflect the student's impairment unless designed to measure a particular deficit.*

(2) Most evaluations should include individually administered:

- *achievement tests*
- *intelligence tests*
- *adaptive behavior assessments*
- *teacher reports*
- *written observation of student's performance in classroom by person other than the child's regular education teacher*

For a student who is suspected of having cognitive delay, the evaluation must include aptitude and achievement tests, teacher recommendations, physical conditions, social or cultural background and adaptive behavior. For a student who has a severe articulation disorder the evaluation must include a standardized speech/language assessment and classroom observation. For a student with a mobility impairment, a physical therapy or occupational therapy evaluation may be necessary.

D. *Development of Individualized Program*

Q. If a student is qualified and needs changes in her or his program, how does a district proceed?

A. After an evaluation is completed, a group of persons knowledgeable about the student must determine what changes, if any, in the educational program need to be made to ensure that this qualified individual has the opportunity to learn comparable to that for students without disabilities.

(1) Assessment information must be considered by a group of people that includes:
   (a) the student's regular teacher;
   (b) at least one person who is knowledgeable about the meaning of the evaluation data;
   (c) an administrator or administrative designee; and
   (d) others who may provide relevant information about the student's educational performance.

(2) The group should:
   (a) review the evaluation data;
   (b) assess the disability's affect on the student's education;
   (c) determine whether specialized services are needed; and (if so)
   (d) identify those services.

(3) All assessment information should be summarized in writing and consideration of its impact documented in minutes of the meeting. All proposed changes in the student's program should be written and provided to the parent along with notice of procedural safeguards.

E. Placement

Q. When determining student placement, what assurances must the district give?

A. The district must ensure that its procedures afford that information is:

- *drawn from a variety of sources;*
- *documented and carefully considered.*

- *The district must also ensure that each placement decision is made by a group of persons knowledgeable about the child, the meaning of the evaluation data, and placement options and that the qualified individual is educated with students without disabilities to the maximum extent appropriate, to the needs of the student with disabilities. 34CFR§104.35 (c)*

The proposed changes in the qualified individual's program must be provided in the least restrictive environment. The qualified individual's program must be in the regular educational environment unless the school district demonstrates that the qualified individual's education cannot be achieved satisfactorily even with the use of supplementary aids and services.

Section 504 does not require development of an IEP with annual goals and objectives. However, a written agreement for modifications for an individualized program is strongly recommended since the school district must document its efforts to meet evaluation and placement requirements under Section 504. Implementation of IEP procedures in accordance with IDEA is one means of meeting this requirement.

F. Reevaluation

Q. Once the modifications are made, does the district have to reevaluate?

A. A school district must establish procedures which ensure that, on a periodic basis and before any subsequent significant change in placement, the school district conducts an evaluation. The evaluation must address all components of the initial evaluation.

School districts will be in compliance if they reevaluate students at least every three years or whenever a change in the student's condition warrants an evaluation. For example, if a student has a special health care problem and her medication changed, the school district should review the student's current program and placement to determine if changes need to be made. If the changes are significant, a comprehensive reevaluation must be conducted.

A "significant" change in placement is defined as a change in the type of program or services offered to the student or a change in the restrictiveness of the program. Examples of "significant" change in placement include the following:

- *expulsion;*
- *individual/serial suspensions exceeding 10 cumulative days in a school year;*
- *transfer of the student to home instruction;*
- *transfer of the student from elementary to departmentalized middle school settings;*
- *graduation from high school;*
- *major change in the student's classroom environment.*

G. Procedural Safeguards

Q. When does a school district need to give parents or guardians notice of their procedural safeguards?

A. Before a school district changes a student's placement or modifies a student's education program, the district must give notice to the parent. Consent is not required under Section 504, although it is advised.

Q. How does a school district conduct a Section 504 impartial due process hearing?

A. A school district must provide a due process hearing procedure for resolving disputes regarding the provision of a free appropriate public education under Section 504. Unlike IDEA, Section 504 regulations do not establish timelines for submission of a hearing request, require specific criteria for selection of hearing officers, define "impartial hearing officer," nor set forth rules for conduct of the hearing. However, similar processes in other regulations provide guidelines. A sample process is on page 59.

If a school district does not establish its own due process hearing procedure for resolving disputes under Section 504, then it must use due process hearing procedures under IDEA. The school district would manage the procedure and pay costs of the hearing.

Discrimination Prohibited

The recipient of federal funds, in providing any aid, benefit, or service, may not directly, or through contractual licensing or other arrangements, discriminate against individuals with disabilities in any of the following ways.

- *An individual with a disability is denied the opportunity to participate in/benefit from an aid, benefit, or service which is afforded students without disabilities.*

- *The disabled individual is not afforded the opportunity to participate in/benefit from an aid, benefit, or service which is equal to that afforded others.*

- *Aids, benefits, or services which are as effective as those provided to students without disabilities are not provided for the student with a disability. "Equally effective" means "equivalent" not "identical." To be equally effective, an aid, benefit, or service need not produce equal results, but must afford equal opportunity to achieve equal results.*

- *More restrictive aids, benefits, or services are provided for/to the student with disabilities. The restriction has not been determined as necessary for the disabled individual.*

- *Assistance is provided to an agency, organization, or person discriminating on the basis of disability.*

- *A person with disabilities is denied, on the basis of disability, the opportunity to participate as a member of a planning/advisory board.*

- *Enjoyment of any right, privilege, advantage, or opportunity enjoyed by others is limited.*

- *Selection of a facility site/location effectively excludes persons with disabilities.*

34 CFR 104.4

SECTION 504 POLICY/PROCEDURES CHECKLIST

(@Perry A. Zirkel, 1991)

Does your school district provide, via policy or procedures, for:	YES	NO
1a. continuing public notice that your district does not discriminate on the basis of handicap with regard to admission or access to and treatment or employment in your programs and activities?	☐	☐
1b. continuing internal notice (i.e., to staff and students) the same effect? [CFR Sec. 104.8 and 104.32(b)]	☐	☐
2. identification in those notices of Sec. 504 coordinator? (34 CFR Sec. 104.7(a) and 104.8)	☐	☐
3. a grievance procedure for handicap discrimination complaints that:		
a. incorporates appropriate due process standards?	☐	☐
b. provides for the prompt and equitable resolution of those complaints? [34 CFR Sec. 104.7(b)]	☐	☐
4. reasonable accommodation for handicapped employees, such as each of the following unless it demonstrably would impose an "undue hardship" on the operation of the program:		
a. accommodations readily accessible to and usable by handicapped persons?	☐	☐
b. job restructuring and part-time or modified work schedules?	☐	☐
c. acquisition or modification of equipment or devices?	☐	☐
d. provision of readers or interpreters and other similar actions? (34 CFR Sec. 104.12)	☐	☐
5. not using employment tests or other section criteria that tend to screen out handicapped persons unless these criteria are demonstrably job related and unless effective alternatives are not available? [34 CFR Sec. 104.13(a)]	☐	☐
6. not making preemployment inquiries as to whether the applicant is handicapped? [34 CFR Sec. 104.14(a)]	☐	☐
7. ready accessibility to handicapped persons to each of your programs and activities when viewed in its entirety?	☐	☐
8. an individualized evaluation (in the native language) for any student who is believed to (a) have a physical or mental impairment which substantially limits one or more major life activities, (b) have a record of such impairment, or (c) be regarded as having such an impairment? [34 CFR Sec. 104.35 and 104.3(j)]	☐	☐
9. for each student meeting any of the criteria in item #8, and appropriate education, which is defined as regular or special education and related aids and services that are designed to meet his/her individual needs as adequately as the needs of non-handicapped persons are met and that are based upon procedures referred to in item #10? (34 CFR Sec. 104.33)	☐	☐

		YES	NO
10.	parental notice (in the native language) of the rights to:		
	a. have an individualized evaluation (item #8)	☐	☐
	b. examine relevant records	☐	☐
	c. demand an impartial hearing with the opportunity to be represented by counsel	☐	☐
	d. obtain a subsequent review (see 34 CFR Sec. 104.36)	☐	☐
11.	When there are separate classrooms for special education, that these be comparable facilities to those for regular education. [34 CFR Sec. 104.34(c)]	☐	☐
12.	Nonacademic and extracurricular services and activities so as to provide handicapped persons with an equal opportunity for participation. (34 CFR Sec. 104.37)	☐	☐
13.	Reasonable access to your programs or activities, if any, of:		
	a. preschool education?	☐	☐
	b. day care?	☐	☐
	c. adult education? (34 CFR Sec. 104.38)	☐	☐
14.	meaningful access for handicapped parents to school-initiated activities in addition to the academic and/or disciplinary aspects of their child's education?	☐	☐

4.0 Questions Regarding Section 504 and Special Issues

A. *Transportation*

Q. Does a school district have to provide transportation to students with disabilities under Section 504?

A. The school district must provide transportation to a student with disabilities if it is necessary to ensure the student has an opportunity to participate in the educational program. For example, if the student requires a bus with a lift for a wheelchair, the district must provide the service.

The district may not discriminate in provision of transportation to students with disabilities. Unless required by a student's individual needs, the length of the bus ride for a student with disabilities may not be longer than that of students without disabilities. Likewise, the bus schedule for a student with disabilities may not lengthen or shorten the school day.

If a district proposes to change or terminate a qualified individual's transportation for inappropriate bus behavior, the district must first determine the relationship between the student's behavior and the disability and whether the modifications were appropriate. The district may terminate transportation after appropriate evaluation and determinations are made. The parent or guardian must be provided with notice of rights.

If a student is placed by a public school district in an out-of-district program not operated by the district, the student must receive transportation to and from the program at no additional cost to the parent or guardian.

B. *Residential Placement*

Q. If a student is placed in a private residential placement by the public school district in order to provide a free appropriate public education, does the school district have to pay for room and board and educational costs?

A. Residential placement must be provided at no cost to the parent or guardian only if the placement is necessary to provide a free appropriate public education [34CFR§104.33(c)(3)]. If another public agency places the student in a residential placement, the school district in which the student lives must ensure that the student receives an appropriate education. The school district is not responsible for room and board costs, but may be responsible for educational costs.

If the school district provides a free appropriate public education to a qualified individual but the **parent chooses** to place the child elsewhere, the school district is not responsible for the cost of the out-of-district placement under the provisions of Section 504.

C. *Nonacademic Services*

Q. Does a school district have to make accommodations for students with disabilities so that they may participate in programs and activities such as music or computer class, lunch and recess periods, school field trips or assemblies?

A. In providing nonacademic activities including meals, recess periods and extracurricular services, the school district must ensure that students with disabilities participate with students without disabilities to the maximum extent appropriate to the needs of the individual student with disabilities.

School districts must provide an equal opportunity to participate in all classes which are appropriate to the student's program. *Districts may not counsel students with disabilities toward more restrictive programs or career objectives.*

A district must provide an equal opportunity for students with disabilities to participate in physical education and athletics. Separate activities may be offered only if determined to be necessary for a student with disabilities. Students with disabilities may not be denied the opportunity to compete for teams or to participate in courses that are not separate or different.

The quality of educational services provided for students with disabilities must be comparable to services provided for students without disabilities. Providing equitable opportunity may require different treatment. However, separate services are not allowed unless needed to provide equitable opportunity.

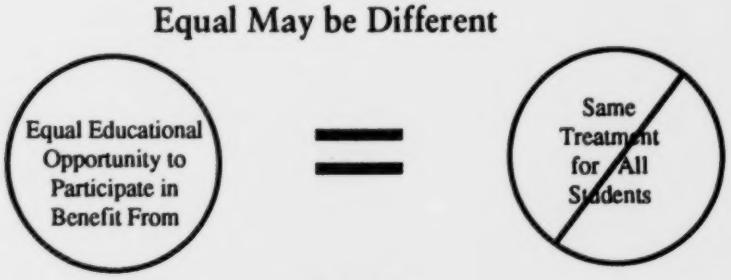

FIGURE 4

D. *Program Accessibility*

Q. Does Section 504 require all buildings to be accessible to students with mobility disabilities?

A. Facilities which were constructed prior to June 3, 1977, need not be made accessible if the program or activity in its entirety is readily accessible to persons with disabilities. Students with disabilities, however, must be afforded an equal opportunity to enjoy the full range of services offered by the district. To make a program accessible, a district can redesign equipment, reassign classes or other services to accessible buildings, assign aides to students, deliver services at alternate accessible sites, or alter existing facilities. If these methods are effective

in achieving compliance, a district need not undertake major structural changes to buildings. However, the district may not deny access to programs because the facilities are not accessible to students with disabilities. Likewise, the district may not segregate disabled students from peers by placement in segregated, although accessible, facilities.

Buildings and building additions constructed since June 3, 1977, must allow access by students with disabilities. New facility construction must be designed so that the facility is readily accessible. Facilities that are altered must be altered in a manner so that the altered portion of the facility is readily accessible. Existing facilities built before June 3, 1977, must be reviewed and a plan developed for achieving full program accessibility.

E. Section 504 Student Records

Q. Is information obtained under Section 504 subject to the confidentiality requirements of the Family Educational Rights and Privacy Act (FERPA)?

A. Section 504 records must be kept in accordance with Family Educational Rights and Privacy Act (FERPA) regulations which are located in 34 Code of Federal Regulations Part 99.

F. Drugs and Alcohol

Q. Are students who are currently using illegal drugs or alcohol protected under Section 504?

A. Student With Drugs or Alcohol At School — A school district may enforce its rules prohibiting the use, sale or possession of illegal drugs and alcohol if the rules are enforced consistently for all students. If a student, including a qualified individual with disabilities, is currently using drugs or alcohol, the school district may use its normal disciplinary policies, including expulsion, as long as proper procedures are followed. Suspension and expulsion of students with disabilities under Section 504 is discussed in an OCR memorandum located in Appendix C.

G. Students With Special Health Care Needs

Q. Do students who receive medication at school or who have extensive health care needs qualify under Section 504?

A. All students who have special health care needs should be considered for a 504 referral. Some of these student may qualify under Section 504. The school district must make reasonable accommodations for delivery of special health care plans at school. (See OPI Health Care Manual, 1992.)

Students with Acquired Immune Deficiency Syndrome (AIDS), AIDS Related Complex (ARC), or infected with Human Immunodeficiency Virus (HIV Positive) qualify as disabled

under Section 504. They qualify either as actually having an impairment substantially limiting a major life activity or as regarded as having such an impairment. Unless currently presenting a contagious risk due to the stage of the disease, the child should remain in the regular classroom.

H. ADD/ADHD

There is a growing awareness in the education community that attention deficit disorder (ADD) and attention deficit hyperactive disorder (ADHD) can result in significant learning problems for children. While estimates of the prevalence of ADD/ADHD vary widely, it is generally believed that 3 to 5 percent of school-aged children may have significant educational problems related to this disorder. ADD/ADHD is not a separate disability in IDEA. Children with this disability may meet eligibility criteria for special education services under other IDEA categories. Children with ADD/ADHD may be classified as "other health impaired" in instances where the ADD/ADHD is a chronic or acute health problem which results in limited alertness or vitality and which adversely affects educational performance. Children with ADD/ADHD may also be determined IDEA eligible under "specific learning disability" or "seriously emotionally disturbed." A school district must provide regular education and special education and related services to children with ADD/ADHD who are not IDEA eligible, but who are qualified students with disabilities under Section 504. Such services may include modified behavior management programs and provisions for administering medication.

I. Funding

Q. Can a district use IDEA monies for identification, evaluation and services for Section 504 students?

A. Section 504 is not a funding statute. Students eligible for services under Section 504 may not benefit from IDEA funds unless they are eligible for special education services under IDEA. IDEA monies may be used for evaluation of a student only if it is believed that the child will also qualify for services under one of the 13 disabling conditions as defined by IDEA.

5.0 Definitions

APPROPRIATE EDUCATION—The provision of regular or special education and related aids and services that are designed to meet individual student needs as adequately as the needs of students without disabilities. The determination of appropriate education must be based upon procedures that satisfy the requirements of 34 CFR 104.34, 104.35, 104.36.

EQUALLY EFFECTIVE—Aids, benefit or service to be "equally effective" are not required to produce the identical result or level of achievement but must afford a student with disabilities an equal opportunity to obtain the same result, to gain the same benefit or to reach the same level of achievement in the most integrated setting appropriate to the student's needs [34 CFR 104(b)(2)].

FACILITY—Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property [34 CFR 104.3(i)].

INDIVIDUAL WITH DISABILITIES (Handicapped Individuals)—An individual with disabilities is a person who:

(1) has a *physical or mental impairment which substantially limits one or more major life activities. The term does not include children disadvantaged by cultural, environmental, or economic factors.*

(2) has a *record or history of such an impairment. The term includes children who have been misclassified.*

(3) *is regarded as having such an impairment:*

- *The individual has a physical or mental impairment that does not substantially limit a major life activity but s/he is treated by the district as having such a limitation.*
- *The individual has a physical or mental impairment that substantially limits a major life activity only as a result of the attitudes of others toward such an impairment.*
- *The individual has no physical or mental impairment, but is treated by the district as having such an impairment.*
  34 CFR 104.3 (j)

MAJOR LIFE ACTIVITIES—Major life activities include walking, seeing, hearing, speaking, breathing, learning, working, caring for one's self, and performing manual tasks. The disability need only substantially limit one major life activity in order for the student to be eligible [34 CFR 104.3 (j)(2)(ii)].

NONACADEMIC SERVICES—Nonacademic services may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school district, referrals to other agencies which provide assistance to individuals with disabilities including both employment by the school district and assistance in making outside employment [34 CFR 104.37].

PHYSICAL OR MENTAL IMPAIRMENT—A physical or mental impairment means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs: cardiovascular; reproductive; endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities [34 CFR 104.3 (j)(2)(i)].

PROGRAM OR ACTIVITY—These terms mean all operations, including all instructional services or extracurricular functions of any school district receiving federal funds regardless of whether the specific program or activity involved is a direct recipient of federal funds.

QUALIFIED INDIVIDUAL—With respect to public preschool, elementary, secondary or adult educational services, a qualified individual is an individual with disabilities (1) of an age during which persons without disabilities are provided such services, or (2) of an age during which it is mandatory under state law to provide such services to persons with disabilities or (3) to whom the state is required to provide a free appropriate public education under IDEA [34 CFR 104.3(k)(2)].

6.0 Sample Forms for Section 504

The forms which follow are samples to be used at the discretion of individual school districts. They may be copied as they are, or modified to meet the specific requirements of district policy.

Form 6.1 may be used to provide notice of and general information about Section 504.

Form 6.2 delineates parent and student rights under Section 504.

Form 6.3 outlines a possible grievance procedure and provides a grievance filing form.

Forms 6.4.1 and 6.4.2 may be used for student referral.

Forms 6.5.1 and 6.5.2 may be used for reporting the proceedings of a Section 504 evaluation.

Forms 6.6.1 and 6.6.2 may be used for developing a regular education intervention plan for a qualified Section 504 student.

Form 6.7 may be used for self-evaluation.

Form 6.8 may be used for accessibility checklist.

6.1 *Information Regarding Section 504 of the Rehabilitation Act of 1973*

Section 504 is an Act which prohibits discrimination against persons with a disability in any program receiving federal financial assistance. The Act defines a person with a disability as anyone who:

- *Has a mental or physical impairment which substantially limits one or more major life activity (major life activities include activities such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working);*
- *Has a record of such impairment;*
- *Is regarded as having such an impairment.*

In order to fulfill its obligation under Section 504, the _____ school district recognizes a responsibility to avoid discrimination in policies and practices regarding its personnel and students. No discrimination against any person with a disability will knowingly be permitted in any of the programs and practices in the school system.

The school district has specific responsibilities under the Act, which include the responsibility to identify, evaluate, and if the child is determined to be eligible under Section 504, to afford access to appropriate educational services.

If the parent or guardian disagrees with the determination made by the professional staff of the school district, s/he has a right to a hearing with an impartial hearing officer.

The Family Educational Rights and Privacy Act (FERPA) also specifies rights related to educational records. This Act gives the parent or guardian the right to:

- *Inspect and review his/her child's educational records;*
- *Make copies of these records;*
- *Receive a list of all individuals having access to those records;*
- *Ask for an explanation of any item in the records;*
- *Ask for an amendment to any report on the grounds that it is inaccurate, misleading, or violates the child's rights;*
- *A hearing on the issue if the school refuses to make the amendment.*

If there are questions, please feel free to contact _____
Section 504 Compliance Coordinator.

Phone _____

6.2 *Parent/Student Rights In Identification, Evaluation And Placement*

Section 504 of the Rehabilitation Act of 1973
Please Keep This Explanation for Future Reference

Below is a description of the rights granted by federal law to students with disabilities. The intent of the law is to keep you fully informed concerning decisions about your child and to inform you of your rights if you disagree with any of these decisions.

You have the right to the following:

- Right to have your child with disabilities take part in, and receive benefits from public education programs without discrimination because of her or his disability.
- Right to receive all information in the parent's or guardian's native language or primary other mode of communication.
- Right to have your child receive a free appropriate public education which includes the right of the child to be educated with students without disabilities to the maximum extent appropriate.
- Right to have your child have equal opportunity to participate in school programs and extracurricular activities sponsored by the school.
- Right to receive notice a reasonable time before a district identifies, evaluates or changes your child's placement.
- Right to inspect and review all of your child's educational records, including the right to obtain copies of education records at reasonable cost unless the cost would deny you access to the records, and the right to amend the record if you believe information contained in the record is inaccurate or misleading. If the school district refuses to amend the record, you have a right to request a hearing.
- Right to have educational evaluation and placement decisions made based on information from a variety of sources and by persons who know the needs of the student, meaning of evaluation data and placement options.
- Right to periodic reevaluation and evaluation before any significant change in placement.
- Right to an impartial hearing if you disagree with the school district's proposed action. You will be an active participant. You have the right to be represented by counsel in the impartial hearing process. You have the right to appeal the impartial hearing officer's decision.

_____
Section 504 Compliance Coordinator

Phone _____

6.3 *Grievance Policy And Procedure*

Policy

It is the policy of the _____ Public School District to provide a learning and working environment free from discrimination. To that end, the District requests students, parents and staff to assist the Superintendent and the Board of Trustees in identifying barriers to a discrimination-free learning and working environment in our school(s). The following Grievance Procedure is provided as an avenue for the expeditious processing of complaints toward the elimination of elements that pollute the learning and working environment with unlawful discrimination.

Definitions

Grievance: a complaint alleging a violation of any policy, procedure, or practice which would be prohibited by Title IX, Section 504 and other federal and state civil rights laws, rules and regulations.

Title IX: of the Education Amendments of 1972, the 1975 Implementing Regulations, and any memoranda, directives, guidelines, or subsequent legislation that may be issued.

Section 504: the Rehabilitation Act of 1973.

Federal and State Civil Rights Laws, Rules and Regulations: 1964 Civil Rights Act, Title VI, Title VII as amended, Title IX, Age Discrimination Act of 1967 and 1975 as amended, Equal Pay Act of 1963, Section 504, the Constitution of Montana, The Montana Human Rights Act, The Montana Code of Governmental Fair Practices, and implementing federal and state rules and regulations.

Grievant(s): a student, parent, guardian or employee of the _____ Public School District who submits a grievance.

Public School District: (address)

Title IX or Title IX/Section 504 Coordinator: the employee designated to coordinate the District's efforts to comply with equity regulations and facilitate processing of complaints (hereafter Coordinator).

Day: a working day; the calculation of days in grievance processing shall exclude Saturdays, Sundays and school holidays. (20-1-305 MCA)

Ridgeway Settlement Agreement: Settlement Agreement on equity in high school inter-scholastic athletics in 1984 (hereafter Ridgeway).

Basic Procedural Rights: applicable to all levels of the grievance process.

The Title IX or Title IX/Section 504 Coordinator shall receive complaints, actively and independently investigate the merit of complaints, and assist the parties in resolution of complaints. The coordinator may be utilized as a resource by any party at any level of this procedure.

Relevant records shall be available in accordance with the Montana Constitution, Article II, Section 10, Right to Privacy and Guidelines for Student Records, Appendix E, Montana School Accreditation Standards and Procedures Manual, March 1989.

This procedure does not deny the right of the grievant to file formal complaints with other state and federal agencies (Montana Human Rights Commission or the U.S. Department of Education Office of Civil Rights) or to seek private counsel for complaints alleging discrimination.

In most instances, parents or legal guardians should be part of the hearing and resolution process. In investigations of sexual harassment, it is recommended that the grievant be accompanied by a friend, parent or advisor for support during any part of the process.

Intimidation, harassment or retaliation against any person filing a grievance or any person participating in the investigation or resolution of a grievance is a violation of law and constitutes the basis for filing a separate grievance.

All records pursuant to the grievance shall be maintained by the District separate and apart from student records for a period of not less than five (5) years. (20-1-212 MCA)

If a grievance is taken to the Board of Trustees for a formal contested case hearing, parties shall have the right to representation, to present witnesses and evidence, and to question opposing witnesses.

It is the policy of this District to process all grievances in a fair, expeditious and confidential manner.

Process

Level 1: Principal or Immediate Supervisor (Informal and optional—may be bypassed by grievant)

Many problems can be solved by an informal meeting with the parties and the principal or Coordinator. An individual with a complaint is encouraged to first discuss it with the teacher, counselor, or building administrator involved with the objective of resolving the matter promptly and informally. Employees with a complaint are encouraged to first discuss it with their principal or immediate supervisor with the same objective. An exception is that complaints of sexual harassment should be discussed with the first-line supervisor or administrator who is not involved in the alleged harassment.

Level 2: Title IX or Title IX/Section 504 Coordinator

If the complaint or issue is not resolved at Level 1, the grievant may file a written grievance stating: 1) the nature of the grievance; 2) the remedy requested; and 3) be signed and dated by the grievant. The Level 2 written grievance must be filed with the Coordinator within fifteen (15) days of the event or incident, or from the date the grievant could reasonably become aware of such occurrence.

The Coordinator has authority to investigate all written grievances. If possible, the Coordinator will resolve the grievance. If the parties cannot agree on resolution, the Coordinator will prepare a written report of the investigation which shall include the following:

- *A clear statement of the allegations of the grievance and remedy sought by the grievant.*
- A statement of the facts as contended by each of the parties.
- A statement of the facts as found by the Coordinator and identification of evidence to support each fact.
- A list of all witnesses interviewed and documents reviewed during the investigation.
- A narrative describing attempts to resolve the grievance.
- The Coordinator's conclusion as to whether the allegations in the grievance are meritorious.

If the Coordinator believes the grievance is valid, the Coordinator will recommend appropriate action to the Superintendent.

The Coordinator will complete the investigation and file the report with the Superintendent within fifteen (15) days after receipt of the written grievance. The Coordinator will send a copy of the report to the grievant.

If the Superintendent agrees with the recommendation of the Coordinator, the recommendations will be implemented.

The Coordinator and Superintendent may appoint an outside investigator once a written grievance is filed.

Level 3: The Board of Trustees

If the Superintendent rejects the recommendations of the Coordinator, and/or either party is not satisfied with the recommendations from Level 2, either party may make a written appeal within ten (10) days of receiving the report of the Coordinator to the Board of Trustees for a full contested case hearing under the rules of Montana Administrative Procedures Act. On receipt of the written appeal, the matter shall be placed on the agenda of the Board of Trustees for

consideration not later than their next regularly scheduled meeting. A decision shall be made and reported in writing to all parties within thirty (30) days of that meeting. The decision of the Board of Trustees will be final, unless the case falls within the parameters of Ridgeway. (See Level 4 below.)

Level 4: County Superintendent

If the case falls within the parameters of Ridgeway, the decision of the Board of Trustees may be appealed to the County Superintendent by filing a written appeal within thirty (30) days after the final decision of the Board pursuant to the Rules of School Controversy (10-6103 et seq. ARM; see also Ridgeway).

Other Options for Grievant

At any time during this process, a grievant may file a complaint with the Montana Human Rights Commission or with the U.S. Department of Education, Office of Civil Rights (Denver, Colorado).

Source: OPI Model Grievance Policy and Procedure, 1991.

6.3 *Section 504 Grievance Procedure/Form*

Following is the grievance procedure to resolve discrimination complaints:

- An alleged grievance under Section 504 must be filed in writing fully setting out the circumstances giving rise to such grievance.
- Such claims must be made in writing and filed with the district's Section 504 compliance coordinator: _____
- The Section 504 compliance coordinator will appoint a hearing officer who will conduct the hearing within ____ working days after the request is received.
- A hearing officer shall give the parent, student, or employee full and fair opportunity to present evidence relevant to the issues raised under the grievance. The parent, student, or employee may, at their own expense, be assisted or represented by individuals of his or her own choice, including an attorney.
- The district's hearing officer shall make his/her decision in writing within ____ working days after the hearing.
- If the parent, student, or employee disagrees with the decision of the hearing officer, an appeal may be filed with the Board of Trustees.

Grievance Filing Form

Date _____

Your name_____

Your school and/or position _____

Place where you may be reached _____

Address _____

Phone _____

Nature of your grievance. (Please describe the policy or action you believe may be in violation of Title IX or other civil rights statute: please identify any person(s) you believe may be responsible.)

_____

_____

If others are affected by the possible violation, please give their names and/or positions:

_____

_____

Please describe any corrective action you wish to see taken with regard to the possible violation. You may also provide other information relevant to this grievance.

_____

_____

_____

_____

_____

_____

Signature of Grievant Date

_____

Signature of Person Receiving Grievance

_____

Date Location

6.4.1 Section 504 Referral Form

I. Personal Information

Student:_____ Date of Birth: _____

Parent: _____ Phone No.: _____

Address:_____ School: _____

Teacher:_____ Grade: _____

Referred by: _____ Date of Referral: _____

II. Background Information

A. Reason for Referral: _____

_____

_____

B. Strategies/Interventions To Date (attach copies of documentation): _____

_____

_____

C. Additional Information Requested: _____

_____

_____

III. Referral Direction (Principal Only)

_____

_____

_____

Principal's Signature Date

Copy to: Regular Education Teacher, Building Principal, and Superintendent

Nancy Keenan, Superintendent
Office of Public Instruction
State Capitol
Helena, MT 59620

SECTION 504 STUDENT REFERRAL

Referral Date	School			Student's Teacher	
Student's Name (Last) (First) (Middle)			Age	Grade	Date of Birth
Father's Name	Mother's Name		Phone (home)		(work)
Parent's Address	(City)		(State)		(Zip)
Primary Language of the Home: ☐ English ☐ Other			Suspected Disability		
Parent Notified of Reason for Referral ☐ Yes ☐ No	Date of Notice				

I. CURRENT STUDENT EDUCATIONAL PROGRAM

- ☐ Regular Class (student schedule attached)
- ☐ Gifted/Talented Program
- ☐ Chapter 1
- ☐ Early Intervention Services
- ☐ Language Enrichment Program
- ☐ Regular School Vocational Program
- ☐ School Counseling/Intervention
- ☐ Other_____

Student Performance on Standardized Group Achievement Tests:

Test Date_____ Test Name_____ Where Given_____

Test Results:

Student Performance on	Vision	Hearing	Speech/Language	Developmental
Screening Date				
Screening Results				

Student Classroom Performance Summary

Yes	No	
☐	☐	Student receives passing grades in all subject areas. If no, the student is currently failing in subject areas_____
☐	☐	Student has been retained. If yes, the student was retained in grade_____.
☐	☐	Student has received disciplinary action for inappropriate behavior. If yes, please explain_____
☐	☐	Student has special health care needs (medication, allergy, etc.) during class activities, including lunch.

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II. SPECIFIC REASONS FOR REFERRAL

_____(Student Name) may have a disability that may require program modification. The areas of concern which need further evaluation are identified below.

☐ Academic ☐ Behavioral ☐ Developmental ☐ Social/Emotional ☐ Vision

☐ Hearing ☐ Speech/Language ☐ Physical ☐ Health ☐ Other_____

Additional information explaining the above reasons and/or situations which make you feel that an evaluation is needed:_____

_____

_____

_____

III. SPECIFIC INTERVENTIONS PRIOR TO REFERRAL

Dates	Implemented By	Intervention	Results of Intervention
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			

IV. FINAL DETERMINATION FOR REFERRAL

Yes	No	
☐	☐	Referred for special health care needs.
☐	☐	Referred for educational evaluation in the area of suspected disability of _____.
☐	☐	Parent sent notice of rights.

Suggested areas of evaluation

☐ Intelligence ☐ Behavior ☐ Vision/Hearing ☐ Medical/Health

☐ Speech/Language ☐ Physical Education ☐ Social/Emotional ☐ Academic Achievement

Signature of Referring Person	Date
Signature of Principal	Date

6.5.1 Section 504 Regular Education Evaluation and Intervention Plan

1. Personal Information

Student:_____ Date of Birth: _____

Parent: _____ Phone No.: _____

Address:_____ School: _____

Teacher:_____ Grade: _____

Referred by: _____ Date of Referral: _____

II. Regular Education Intervention Plan

A. A Section 504 conference was convened on behalf of the above-mentioned student on _____.
Date

B. The following data was presented: _____

_____

_____

C. Options Discussed: _____

_____

_____

D. Least Restrictive Environment discussed: _____

_____

_____

E. This student's Multidisciplinary Group has determined that the disability is projected to be _____ short-term (three months or less) or _____ long-term.

F. On the basis of the data presented, the following decision was made:

_____ 1. The student is identified as a Section 504 disabled student and qualifies for REIP services.

_____ 2. The student is not disabled.

Copy to: Regular Education Teacher, Building Principal, and Superintendent

Nancy Keenan, Superintendent
Office of Public Instruction
State Capitol
Helena, MT 59620

SECTION 504 EVALUATION REPORT

Today's Date	Student's Name	
Age	Grade	Date of Birth
Parent's Name		Phone
Referral Date	School	
Reason for Meeting Today		

EVALUATION RESULTS

1. Academic Assessment Results: Evaluator_____ Date of Eval/Observ_____

2. Regular Classroom Performance: Reporting Teachers_____ Date of Eval/Observ_____

3. Social/Emotional/Behavioral Assessment Results: Evaluator_____ Date of Eval/Observ_____

4. Medical/Physical/Sensory Assessment Results: Evaluator_____ Date of Eval/Observ_____

5. Other Assessment Results: Type_____ Evaluator_____ Date of Eval/Observ_____

6. Observation

   A. Observation by:_____ B. Location:_____ C. Date:_____

   D. Relevant Behavior:_____

   E. Relationship of that behavior to educational performance_____

DOCUMENTATION OF ELIGIBILITY

1. ☐ Student has physical or mental disability which substantially limits one or more major life activities. The disability is

_____.

The disability affects the student's _____.
(learning, walking, speech, etc.)

☐ Student has no physical or mental disability which substantially limits one or more major life activities.

☐ Student has physical or mental disability which does not substantially limit one or more major life activities. The disability is

_____.

2. Basis for making determination of disability: _____

_____

_____

_____

3. Program Changes Needed for:

☐ Academics ☐ Non-academics ☐ Transportation

☐ Accessibility ☐ Specialized Health Care ☐ Discipline

☐ Career/Vocational Counseling ☐ Behavior ☐ Other _____

4. Special Instructional Considerations: _____

_____

_____

_____

DOCUMENTATION OF PARTICIPATION IN THIS EVALUATION MEETING

The following persons, as indicated by their signatures, have participated in the determination of elibility:

Signature	Date	Position
_____		Administrator or Designee
_____		Regular Education Teacher
_____		Evaluator
_____		Evaluator
_____		Parent
_____		_____
_____		_____
_____		_____

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6.6.1 Section 504 Regular Education Intervention Plan

Name: _____ Date of Meeting: _____

School:_____ Date of Birth: _____

Grade: _____

1. Describe the nature of the concern:

_____
_____
_____

2. Describe the basis for the determination of disability (if any):

_____
_____
_____

3. Describe how the disability affects a major life activity:

_____
_____
_____

4. Describe the reasonable accommodations that are necessary

_____
_____
_____

Review/Reassessment Date: _____
(must be completed)

Participants (Name and title)

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

cc: Student's Cumulative File

Attachment: Information Regarding Section 504 of the Rehabilitation Act of 1973.

6.7 Supplemental Information About Section 504 Self-Evaluation Requirements

Purpose

Basic information about Section 504 self-evaluation requirements has been provided in an earlier Technical Assistance Guide (TAG) entitled "Section 504 Transition Plan and Self-Evaluation Information."[1] This earlier TAG contains important information essential to understanding the self-evaluation process and agencies are encouraged to carefully review it. The purpose of this TAG is to provide agencies with a Self-Evaluation Review Form that may assist them to organize and carry out self-evaluation efforts for their non-employment programs and activities.[2]

Information

The Self-Evaluation Review Form is being provided to agencies as a part of the Department of Justice's ongoing technical assistance effort. Use of the Review Form does not eliminate the need for a careful review of Section 504 regulatory requirements and a thorough knowledge of the agency's programs and activities. Because of the diversity of federal agency programs and activities and the general nature of the Review Form, use of the Review Form, by itself, does not ensure that all aspects of the agency's programs and activities have been reviewed or reviewed properly. The fact that this form has been provided to agencies by the Department of Justice does not mean that it must be used or that it is the only useful and effective way of evaluating an agency's programs and activities. ***The Review Form is a tool designed to assist agencies in developing their own approach to conducting a Section 504 self-evaluation and ensuring that individuals with handicaps can participate in all of the agency's programs and activities. The Department does not recommend that agencies use the Review Form without first carefully considering how the Section 504 self-evaluation process applies to their own programs and activities.***

[1]TAG-87-1 is available from the Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530 (202) 724-2222 (Voice), (202) 724-7678 (TDD).

[2]Section 501 of the Rehabilitation Act, which is administered by the Equal Employment Opportunity Commission (EEOC), addresses employment discrimination. Federal agencies should refer to the regulation implementing Section 501 and the supporting information developed by EEOC for guidance about eliminating discrimination on the basis of disability in their programs. The regulation implementing Section 501 and the related information can be obtained from the Equal Employment Opportunity Commission, 1801 "L" Street, NW, Washington, D.C. 20507, (202) 634-6260 (Voice), (202) 634-7057 (TDD).

The form is organized into General Instructions and the topical areas listed below. As indicated, the Department of Justice has additional information available relevant to several of the areas to be reviewed.[3]

1. Agency Personnel Responsible for the Section 504 Self-Evaluation Process
2. Notification
3. Policies that Limit the Participation of Individuals with Disabilities in Agency Programs and Activities
4. Information and Training for Staff
5. Complaints
6. Use of Contractors
7. Accessibility of New and Newly Acquired Facilities (see TAG's-86-2, 87-5, 88-8)
8. Transportation
9. Decisions About Undue Financial and Administrative Burdens
10. Telephone Communication (see TAG's 84-2, 86-2, 87-2, 88-2)
11. Documents and Publications (see TAG's 84-3, 85-1, 85-3, 88-6)
12. Interpreters (see TAG's 84-1, 85-1)
13. Readers and Amanuenses (see TAG's 85-1, 88-1)
14. Assistive Listening Devices (see TAG's 85-1, 85-2)
15. Audio-Visual Presentations (see TAG's 84-4, 87-4, 88-7)
16. Automated Electronic Equipment (see TAG 87-3)
17. Emergency Evacuation
18. Participation of Individuals with Disabilities in the Self-Evaluation Process (see TAG 88-9)

[3] Copies of the TAG's cited are available from the Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530 (202) 724-2222 (Voice, (202) 724-7678 (TDD).

Availability in Alternate Formats

This document is available, on request, from the Coordination and Review Section (see address below) in the following formats.

- Audiotape
- Large Print
- Braille
- Computer Disk

Resources

A list of resources has been compiled and can be obtained by contacting:

Coordination and Review Section
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 724-2222 (Voice)
(202) 724-7678 (TDD)

Self-Evaluation Review Form
General Instructions

1. ***List all of the programs and activities conducted by the agency and provide a concise description of each.*** (For a discussion of what programs and activities should be reviewed, see TAG 5-87-1.) Each description should explain the purpose of the program or activity and provide information on the following items, among others, when appropriate.

- ➤ How non-employees participate in the program.
- ➤ What role publications and other Government documents play in the program.
- ➤ What role telephone access plays in the program.
- ➤ What function meetings, hearings, training sessions, and other forms of assembly play in the program.
- ➤ What the role of television, video, and other audio-visual presentations is in the program.
- ➤ How the agency notifies the public about the program.
- ➤ What the role of contractors is in the agency's programs.
- ➤ What the role of transportation services is in the program.
- ➤ What role reading rooms, libraries, or similar facilities have in the program.
- ➤ What role automated equipment plays in the program.

2. ***Collect and document the policies and practices that govern the administration of each of the agency's programs and activities.*** An agency's policies may be in the form of written policies, manuals, policy directives, administrative directives, guidance memoranda, and unwritten policies. Whether this compilation is done for each program and activity individually or for the program as a whole depends on the number and complexity of the programs and activities. For purposes of this TAG, the Review Form is designed to address each program and activity separately. Agencies are encouraged to tailor the form to their own needs.

3. ***Analyze how the agency's policies and practices, or lack of such, affect or might affect individuals with disabilities.*** The information gathered about the agency's programs and activities in step one above should help identify some of those aspects of program operation to be examined. The overall goal is to determine what conditions must be present for individuals with different kinds of disabilities to participate fully in the agency's programs and activities. In this analysis the agency must take into account the fact that discrimination can happen not only as a result of what is in its policies but also as a result of what is not in its policies.

4. ***Make and document changes and additions to agency policy.***

5. ***Obtain comments on the draft self-evaluation from individuals with disabilities and other interested persons.***

Self-Evaluation Review Form

Agency name:

Agency program:

Location of program:

Brief description of program:

1. ***Agency Personnel Responsible for Section 504 Self-Evaluation***

- Identify agency personnel and the agency unit(s) responsible for conducting the self-evaluation.

2. ***Notification***

- Describe how the agency notifies the public about its nondiscrimination policies and what special procedures are used for individuals with disabilities.

- Describe the existing written policy and how it has been communicated to all appropriate program staff.

- Describe the policy that needs to be established.

- Describe how the agency notifies the public and other interested parties that agency meetings, hearings, and conferences will be held in accessible locations and that auxiliary aids will be provided, upon request, to participants with disabilities.

✍ List the appropriate documents to include policy statements about nondiscrimination.

✍ List the appropriate unit in the agency to establish such a policy.

✍ Give the date that the policy was established and distributed to staff and a citation for the policy.

3. ***Policies that Limit the Participation of Individuals with Disabilities in Agency Programs and Activities***

✍ List all sources of policies (including statutes, regulations, and subregulatory sources such as policy directives and guidance memoranda, manuals and other guidelines) that govern the administration of the agency's programs.

✍ List agency program eligibility and admission criteria or licensing standards and procedures that establish standards for Federal and non-Federal programs and activities. Particular attention should be paid to policies incorporating or establishing:

- physical or mental fitness or performance requirements;
- safety standards;
- testing requirements;
- educational requirements;
- work experience requirements;
- income level requirements;
- credit rating requirements;
- requirements based on disability;
- requirements that prohibit participation because of disability; and
- insurability requirements.

Policies concerning these areas may have the effect of limiting or excluding the participation of persons with disabilities in programs and activities and should, therefore, be the subject of close scrutiny.

✍ Describe how these policies were examined to determine if they had the purpose of effect of excluding or limiting the participation of individuals with disabilities in programs and activities.

✍ List the policies and practices that have the direct or indirect effect of excluding or limiting the participation of individuals with disabilities in agency programs and activities.

✍ List any such policies that will be altered or eliminated.

✍ Describe how these changes were communicated to agency staff and the public.

✍ List any such policies that will be retained by the agency.

✍ Describe how the agency determined that the retention of such policies was justified.

4. ***Information and Training for Staff***

- What staff members need to be aware of the agency's obligations under Section 504 and agency policies designed to enable persons with disabilities to participate in agency programs and activities?

- List steps to be taken to ensure that staff fully understand agency policy of nondiscrimination on the basis of disability and can take all appropriate steps to facilitate the participation of individuals with disabilities in agency programs and activities.

- List agency unit(s) responsible for taking the steps indicated above.

5. ***Complaints***

- Identify the agency unit responsible for receiving and processing complaints.

- Describe the process by which complaints are processed.

- Describe the ways in which the agency notifies staff and program participants about the complaint process.

- Indicate the appropriate policy source to include information about complaints.

✍ Give the date the policy was established and distributed to staff and give a citation for the policy.

6. ***Use of Contractors***

✍ List contractors that are used by the agency to conduct programs or activities on behalf of the agency.

✍ Describe steps that have been taken to ensure that agency procurement officials understand Section 504 requirements as they apply to contractors.

✍ Provide language included in agency contracts to ensure that contractors are aware of their obligations to take steps to facilitate the participation of individuals with disabilities in programs and activities they operate on behalf of the agency.

✍ Indicate the appropriate policy source to include information about Section 504 requirements as they apply to contractors.

✍ Give a date that the policy was established and distributed to staff and give a citation for the policy.

7. ***Accessibility of New and Newly Acquired Facilities***

✍ List the steps taken to ensure that all future construction and renovation work will be carried out in accordance with UFAS.

✍ Describe the steps taken to ensure that all newly acquired space in existing facilities is accessible.

✍ Identify the agency unit responsible for taking these steps.

✍ Indicate the appropriate policy source to include information about new and newly acquired buildings.

✍ Give the date the policy was established and distributed to staff and contractors and give a citation for the policy.

8. ***Transportation***

✍ Describe any transportation programs in which the agency is involved.

✍ Describe the steps that have been taken to ensure that these programs are accessible to individuals with disabilities.

✍ Indicate the agency unit responsible for transportation policy.

✍ Identify the appropriate policy source to include information on transportation.

- Give the date the policy was established and distributed to staff and give a citation for the policy.

9. ***Decisions about Undue Financial and Administrative Burdens***

- Identify the individual responsible for making the final decision about undue financial and administrative burdens.

- Describe the agency's procedure for ensuring that such decisions are made properly and expeditiously.

- Indicate the appropriate policy source to include information about undue financial and administrative burdens.

- Give the date the policy was established and distributed to staff and give a citation for the policy.

10. ***Telephone Communication***

- Describe the means the agency has for communicating effectively over the telephone with hearing-impaired persons.

- List the location and telephone numbers of telecommunication devices for the deaf (TDDs) that the agency has installed to facilitate communication with hearing-impaired persons.

- Indicate in what agency, commercial telephone, or TDD directories the TDD numbers have been listed.

- Describe the arrangements the agency has made with any TDD relay services to facilitate communication with hearing-impaired persons.

- If the agency uses "800" incoming WATS telephone service in its program, indicate what steps have been taken to ensure that this service is usable by persons with hearing impairments.

- Describe the steps that have been taken to ensure that the agency's documents published in the *Federal Register* list a TDD number.

- What steps have been taken to familiarize appropriate staff with the operation of TDDs and other effective means of communicating over the telephone with hearing-impaired persons?

- What agency unit is responsible for ensuring that telephone communication is accessible?

- Indicate what policy source includes information on telephone communication accessibility.

- Give the date the policy was established and distributed to staff and give a citation for the policy.

11. ***Documents and Publications***

- List all agency publications and documents that are available to the public.

- Describe the policy that determines which documents are made available in alternate formats (audiotape, large print, Braille, computer disk, etc.) and which are not.

- Describe agency policy affecting portrayal with disabilities in publications.

- What procedures have been established to ensure that documents can be put in alternate formats?

- What agency unit is responsible for making documents and publications available in alternate formats?

- Indicate what policy source includes information on making agency documents and publications available in alternate formats.

- Give the date that the policy was established and distributed to staff and give a citation for the policy.

12. ***Interpreters***

- List all agency activities where a sign language and/or oral interpreter might be needed to ensure that persons with hearing impairments can fully participate.

- Describe the process by which the agency secures the services of interpreters.

- Indicate how the agency ensures that interpreters are provided in an expeditious manner at meetings, interviews, conferences, public appearances by agency officials, and hearings.

- Describe how the agency ensures that its use of interpreters results in effective communication.

- What agency unit is responsible for making interpreters available in agency programs and activities?

- Indicate what policy source includes information on providing interpreters.

- Give the date that the policy was established and distributed to staff and give a citation for the policy.

13. ***Readers and Amanuenses***

✍ List all agency programs and activities where readers for persons with vision impairments and amanuenses for persons with manual impairments might be needed to ensure that such individuals can participate fully in the program or activity.

✍ Describe the process by which the agency secures the services of readers and amanuenses.

✍ Indicate how the agency ensures that readers and amanuenses will be provided in libraries, hearings, conferences, meetings, and in other contexts in an expeditious manner.

✍ What agency unit is responsible for ensuring that readers and amanuenses are provided in the agency's programs and activities?

✍ Indicate what policy source includes information on providing amanuenses and readers in agency programs and activities.

✍ Give the date that the policy was established and distributed to staff and give a citation for the policy.

14. ***Assistive Listening Devices***

✍ Describe the methods the agency has for ensuring that individuals with hearing impairments who do not read sign language can participate effectively in meetings, conferences, and hearings.

- If assistive listening devices are provided, describe the policy for providing assistive listening devices (ALDs) in agency programs and activities.

- What agency unit is responsible for providing ALDs in the agency's programs and activities?

- Indicate the policy source that includes information about providing ALDs in agency programs and activities.

- Give the date that the policy was established and distributed to staff and give a citation for the policy.

15. ***Audio-Visual Presentations***

- Describe the ways that audio-visual presentations (film, videotape, or television) are used by the agency in its programs and activities.

- Indicate if these presentations are captioned and, if they are not, indicate what steps have been taken to ensure that hearing-impaired persons can benefit from these presentations.

- Describe the policy for making audio-visual presentations accessible to individuals with disabilities.

- Describe agency policy affecting the portrayal of individuals with disabilities in audio-visual presentations.

- Indicate the policy source that includes the information about making audio-visual presentations used by the agency accessible to individuals with disabilities.

- What agency unit is responsible for ensuring that audio-visual presentations are accessible to individuals with disabilities?

- Give the date that the policy was established and distributed to staff and give a citation for the policy.

16. ***Automated Electronic Equipment***

- Describe the ways that the agency uses automated electronic equipment, including automated telephone equipment, in its program and activities.

- Describe the steps that have been taken to determine if the automated electronic equipment is accessible to and usable by individuals with disabilities.

- What agency unit is responsible for ensuring that automated electronic equipment is accessible to and usable by individuals with disabilities?

✍ Indicate the policy source that includes information about the accessibility of automated electronic equipment to individuals with disabilities.

✍ Give the date the policy was established and distributed to staff and give a citation for the policy.

17. Emergency Evacuation

✍ Describe how the agency notifies employees and members of the public of an emergency.

✍ List equipment that is employed to notify individuals with disabilities of an emergency.

✍ What agency unit is responsible for establishing and implementing emergency evacuation procedures?

✍ Indicate what policy source includes information on emergency evacuation procedures.

✍ Give the date that the policy was established and distributed to staff and give a citation for the policy.

18. ***Participation of Individuals with Disabilities and Other Interested Persons in the Self-Evaluation Process***

✍ Describe the ways that individuals with disabilities and other interested persons are involved in the self-evaluation process.

✍ Indicate whether the general public or only selected groups or individuals will be involved in the self-evaluation process.

✍ Indicate how the agency will ensure that comments from persons with a variety of disabling conditions will be solicited.

✍ Indicate if notice of the availability for comment on the self-evaluation will be published in the *Federal Register*.

✍ What agency unit is responsible for securing comment on the self-evaluation for the agency?

Nancy Keenan, Superintendent
Office of Public Instruction
Department of Vocational Education Services
State Capitol
Helena, Montana 59620

SECTION 504
Checklist of Accessibility

Please fill in the form completely. Include any suggestions or comments on alternative ways to make designated facility accessible to people with disabilities. See attached Uniform Federal Accessibility Standards for specific standards.

Name of Property: _____

Address: _____

_____

Date: _____ Person(s) Surveying: _____

Title(s): _____

SITE ENTRY

YES	NO	Parking
☐	☐	Are there parking spaces reserved for people with disabilities?
☐	☐	Are the spaces at least 12 feet long by 6 feet wide?
☐	☐	Is there a sign reserving these spaces for people with disabilities?
☐	☐	Is there a ramp, if necessary, between the parking space reserved for people with disabilities and the building?

COMMENTS AND OBSERVATIONS: _____

_____

_____

YES	NO	Curbs, Ramps and Walks
☐	☐	Do all of the ramps have an edge no higher than ½ inch?
☐	☐	Do these ramps have no more than 1:12 maximum slope?
☐	☐	Are the ramps at least 40 inches wide?
☐	☐	Are there handrails on each side of the ramp?
☐	☐	Are the walkways at least 48 inches wide?
☐	☐	Are the walkways clear of debris and/or hazardous objects?
☐	☐	Are outside steps protected from the weather?

COMMENTS AND OBSERVATIONS: _____

_____

BUILDINGS

YES	NO	Doors and Doorways
☐	☐	Is every door to be used by the public, interior and exterior, equipped with a clear opening of at least 32"?
☐	☐	Are doors easy to pull or push open--requiring no more than 8 pounds of pressure.
☐	☐	Are thresholds of doors no higher than ½ inch?
☐	☐	Are door openers easy to operate, being a loop or lever type?

COMMENTS AND OBSERVATIONS: _____

_____

_____

YES	NO	Elevators
☐	☐	Is there a clear door opening of at least 32"?
☐	☐	Is there adequate maneuvering space for wheelchairs?
☐	☐	Are the top elevator controls between 48-54" maximum?
☐	☐	Are there floor numbers and other information items raised or brailled for blind people?
☐	☐	Is there railing in the elevator cab?
☐	☐	Does the elevator stop exactly at floor level?

COMMENTS AND OBSERVATIONS: _____

_____

_____

YES	NO	Toilets
☐	☐	Are there public toilets on each floor for each sex?
☐	☐	Is there a toilet stall provided to accommodate a wheelchair?
☐	☐	Is this designated stall at least 5'6" by 5'6" (or 6' by 5')?
☐	☐	Is the door to this stall at least 3' wide?
☐	☐	Are there grab rails beside and behind the water closet?
☐	☐	Is there no more than 1½ inches between the rail and the wall?
☐	☐	Is there a urinal set no more than 15-17" above the floor?
☐	☐	Are the sinks, mirrors, towels, and wastebasket accessible for people who use wheelchairs?

COMMENTS AND OBSERVATIONS: _____

_____

_____

YES	NO	Other
☐	☐	Is there 29-30" of space for wheelchair users' knee clearance under water fountains?
☐	☐	Is the spout of the water fountain no more than 34" high?
☐	☐	Is the water fountain recessed into the wall, thus avoiding a hazard to blind people?
☐	☐	Do information-giving signs and directories have raised lettering for blind people?
☐	☐	Are these signs no more than 4'6"-5'6" above the floor?

COMMENTS AND OBSERVATIONS:

Procedural Safeguards
Impartial Due Process Hearing

A parent of a qualified individual with disabilities or the school district may request a due process hearing with respect to actions regarding the identification, evaluation, or educational placement of students, who, because of disability, need or are believed to need special instruction or related services. At a minimum, the impartial hearing must have an opportunity for participation by the student's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of Section 615 of the Individuals with Disabilities Education Act is one means of meeting this requirement.

1. The school district is responsible for ensuring that an impartial hearing process is available. If the district does not have an impartial hearing process available, the district should use Rules 10.16.2401 through 10.16.2417, Administrative Rules of Montana.

2. If the district does not have a process for review of the impartial due process hearing officer's decision, the district should use procedures found in statute 2-4-701, Montana Code Annotated.

3. Mediation is available to the parties if both the parent and the school district voluntarily agree to resolve the dispute through mediation. It is important to remember that the district may not REQUIRE the parents to refer the dispute to mediation. The Office of Public Instruction will provide a list of trained mediators upon request.

Steps in Impartial Hearing Process

1. Written request for impartial hearing received by school district.

2. Official notice of impartial hearing request sent to parties. If strike list is used, strike list is sent at this time.

3. Impartial hearing officer appointed by school district.

4. Pre-hearing conference. Schedule date, place and time for hearing. Identify issues to be heard. Identify facts with which both parties agree.

5. Hearing.

6. Written report from hearing officer.

7. Review of hearing officer report if requested by either party.

Appendix A

FEDERAL REGISTER, MAY 9, 1980
SECTION 504
REHABILITATION ACT OF 1973
1990 AMENDMENTS

Subpart E—Postsecondary Education

104.41 Application of this subpart.
104.42 Admissions and recruitment.
104.43 Treatment of students: general.
104.44 Academic adjustments.
104.45 Housing.
104.46 Financial and employment assistance to students.
104.47 Nonacademic services.
104.48–104.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

104.51 Application of this subpart.
104.52 Health, welfare, and other social services.
104.53 Drug and alcohol addicts.
104.54 Education of institutionalized persons.
104.55–104.60 [Reserved]

Subpart G—Procedures

104.61 Procedures.
104.62–104.99 [Reserved]
Appendix A—Analysis of Final Regulation.
Appendix B—Guidelines for eliminating discrimination and denial of services on the basis of race, color, national origin, sex, and handicap in vocational education programs.

Authority: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94–142, 89 Stat. 795.

Subpart A—General Provisions

§ 104.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 104.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Education and to each program or activity that receives or benefits from such assistance.

§ 104.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94–142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Education.

(e) "Assistant Secretary" means the Assistant Secretary for Civil Rights of the Department of Education.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicappped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 104.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activitiy which receives or

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benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§ 104.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Assistant Secretary, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Assistant Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 104.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Assistant Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Assistant Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request: (i) a list of the interested persons consulted (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§ 104.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§104.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applications, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 104.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 104.9 Administrative requirements for small recipients.

The Assistant Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 104.7 and 104.8, in whole or in part, when the Assistant Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 104.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 104.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe

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benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absense, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 104.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 104.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 104.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

§§ 104.15–104.20 [Reserved]

Subpart C—Program Accessibility

§ 104.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 104.22 Existing facilities.

(a) *Program accessibility.* A recipient shall operate each program or activity to

which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicappped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§ 104.23 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *American National Standards Institute accessibility standards.* Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971)), which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided. Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register.

Copies obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

§§ 104.24-104.30 [Reserved]

Subpart D—Preschool, Elementary, and Secondary Education

§ 104.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 104.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§ 104.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one

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that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and § 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 104.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§ 104.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 104.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is belived to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 104.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§ 104.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education

program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§ 104.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 104.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§ 104.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 104.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§ 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of §§ 104.34, 104.37, and 104.38.

§ 104.40 [Reserved]

Subpart E—Postsecondary Education

§ 104.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 104.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 104.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 104.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided,* That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the

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information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 104.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 104.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 104.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 104.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§ 104.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient

that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§ 104.48–104.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

§ 104.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 104.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 104.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Assistant Secretary may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 104.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 104.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 104.3(k)(2), in its program or activity is provided an appropriate education, as defined in § 104.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.

§§ 104.55–104.60 [Reserved]

Subpart G—Procedures

§ 104.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 100.6–100.10 and Part 101 of this Title.

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1990 AMENDMENTS TO SECTION 504 OF THE REHABILITATION ACT OF 1973

29 USC § 706 (8)

(A) Except as otherwise provided in subparagraph (B), the term "individual with handicaps" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and II of this chapter.

(B) Subject to subparagraphs (C) and (D), the term "individual with handicaps" means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(C) (i) for purposes of title V, the term "individual with handicaps" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who --

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) and (II) is no longer engaging in the illegal use of drugs.

(iii) Notwithstanding clause (i), for purposes and activities providing health services and services provided under title I, II, and III, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

(iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 CFR 104.36 shall not apply to such disciplinary actions.

(v) For purposes of sections 503 and 504 as such sections relate to employment, the term "individual with handicaps" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

(D) For the purposes of sections 793 and 794 of this title, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

Add new section at end of §706, as follows:

(22) (A) The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(B) The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Appendix B

OFFICE OF CIVIL RIGHTS

SENIOR STAFF MEMORANDA:

DISTINCTIONS BETWEEN SECTION 504 AND IDEA

ILLEGAL USE OF DRUGS AND/OR ALCOHOL

CHIEF STATE SCHOOL OFFICE MEMORANDA

IDEA AND 504 REGISTER ADHD

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

OCT 24 1988

TO : OCR Senior Staff

FROM : LeGree S. Daniels
Assistant Secretary
for Civil Rights

SUBJECT: Distinctions Between Section 504 and the Education of the Handicapped Act

This memorandum provides clarification of the requirements concerning elementary and secondary education under Section 504 of the Rehabilitation Act of 1973 (Section 504) and Part B of the Education of the Handicapped Act (EHA). The Office for Civil Rights (OCR) has responsibility for enforcing Section 504, while the Office of Special Education and Rehabilitative Services (OSERS) has responsibility for the EHA. In any discussion of the two laws it is useful to bear in mind the respective origins and purposes of the statutes. The EHA, a grant statute, attaches many specific conditions to the receipt of Federal funds. Section 504, mandating nondiscrimination on the basis of handicap, is less specific. The regulations implementing Section 504 and the EHA have significant similarities and differences, a few of which are addressed in this memorandum.

Subpart D of the Section 504 regulation (34 C.F.R. Part 104) and of Appendix A -- Analysis of Final Regulation -- indicate ways in which Section 504 and the EHA intersect. Three sections of the Section 504 regulation (§§ 104.33(b)(2), 104.35(d), and 104.36) state that one means for recipients to comply with Section 504 with respect to those sections, is to comply with the EHA. OCR, therefore, sometimes must review recipients' activities in light of the EHA, making a thorough familiarity with the EHA essential. Consistency with the standard enunciated in the EHA in these specified areas is compliance with Section 504.

Since consistency with the EHA is only one means of complying with these three provisions of the Section 504 regulation, however, noncompliance determinations cannot rest solely on a conclusion that a recipient has not met the standards of the EHA. While a recipient may comply with these three sections of the Section 504 regulation by complying with the EHA, failure to meet the EHA standard does not necessarily constitute a violation of Section 504, and must not be the basis for OCR's analytic approach or conclusions.

When a state announces that it will fulfill the requirements of Section 504 by carrying out EHA requirements, OCR may not find a Section 504 violation based on failure to comply with the EHA. OCR lacks authority to adopt standards of another statute in an effort to simplify its investigations. Moreover, OCR should never appear to provide an official interpretation of the EHA and its implementing regulation, nor imply that it makes findings of compliance or noncompliance under the EHA. In all cases, OCR must make an independent

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determination with respect to compliance with Section 504. In the interest of consistency in the interpretation of Section 504 and the EHA, the EHA regulations and case law may provide guidance on the reasonable interpretation of Section 504. However, there is no simple rule for when and how to apply EHA case law to specific issues. As in the application of Title VII case law, in some instances, analogies may be drawn, depending on judicial reasoning, statutory language, and legislative intent. Discussed below are a few examples of fact situations, drawn from actual OCR cases, that have presented difficulties.

For purposes of this memorandum, the reader can assume that, in all examples, the school districts receive EHA funds and have declared their intention to fulfill the relevant requirements of Section 504 by complying with the EHA.

DEFINITIONS/COVERAGE

Coverage of the two statutes and their respective implementing regulations is couched in different terms. Section 504 applies to all qualified handicapped persons in federally funded programs and activities. In contrast, the EHA applies only to children having impairments specified in the statute and regulation "who because of those impairments need special education and related services." (34 C.F.R. § 300.5.) Appendix A to the Section 504 regulation contains indications of an intent to make the two laws consistent, for example, by adopting the EHA definition of "specific learning disabilities." While the resultant coverage may, in many cases, be similar, the analytical approach is different. OCR's approach must always be that of the Section 504 regulation.

The Section 504 regulation at § 104.3(j) specifies:

> (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. . . .
>
> (2)(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Example 1

Facts: A student has been identified as addicted to drugs, a handicap under the Section 504 regulation. No other handicapping condition has been identified that would require special education services that would trigger eligibility for services under the EHA. The student is truant from school, and most of his teachers believe that his educational needs are not being met and that the truancy is caused by his handicap. However, the school district limits its provision of services to individuals who would be eligible for special education under the EHA, has a blanket policy of not considering drug or alcohol addiction to be a physical or mental impairment, and refuses to evaluate the student.

Analysis: OCR's analysis is not tied to the child's ineligibility for special education services under the EHA. Section 504 coverage in some instances will be narrower and in other instances will be broader than that of the EHA. While eligibility for special education virtually always is an indication that a child is handicapped or believed to be handicapped, the converse is not always true. The critical consideration is that OCR must follow the Section 504 regulatory definitions. In this case, OCR would find a violation of Section 504 because the district may not limit its services to students who have handicapping conditions recognized under the EHA. The case offers an example of a situation in which a district might, at the same time, be in violation of Section 504 and in compliance with the EHA. This student has a handicap, as defined by the Section 504 regulation, so the school district must determine whether his educational needs are being met to the extent that the needs of nonhandicapped students are met. (This memorandum does not address what services are appropriate or what disciplinary actions may be taken with respect to drug use.)

Example 2

Facts: A student enrolled in the regular education program has juvenile rheumatoid arthritis, which requires periodic administration of medication during the school day. Without the medication, the child's ability to benefit from education is hampered. After completion of EHA procedures, the district determines the child is not in need of special education. Because, under EHA definitions, related aids and services may be limited to those necessary to enable a child to benefit from special education, the school district claims no obligation to assist the child with her medication.

Analysis: The child has a physical impairment that substantially limits a major life activity. Although not considered to be entitled to special education under the EHA, she would be a handicapped person covered by Section 504.

APPROPRIATE PUBLIC EDUCATION

The Section 504 regulation requires that recipients provide a free appropriate public education (FAPE) to qualified handicapped persons. The regulation at § 104.33(b) states:

> (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.
>
> (2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i). . . .

Implementation of an individualized education program (IEP) that has been developed in accordance with the EHA meets the FAPE requirements of Section 504. However, implementation of an IEP document that fails to meet the requirements of the EHA does not necessarily violate Section 504 because Section 504 does not require the development of an IEP document. The content of an IEP document that does not meet the requirements of the EHA nevertheless may serve as important evidence of whether the requirements of Section 504 have been met.

OCR's analytical approach, therefore, does not track a recipient's alleged failure to have or implement correctly an IEP document. The approach is to determine whether a child's needs were determined on an individualized basis, whether the evaluation and placement procedures that were applied conformed with those specified in the Section 504 regulation, and whether the placement, aids, and services identified by the recipient through this process as necessary to meet the student's individual needs are being provided. Although the EHA regulation contains more detailed requirements for determining and recording the educational needs of and services to handicapped students, and a recipient has developed procedures for conforming with the EHA, OCR's analysis of Section 504 compliance is not coextensive with an analysis of the recipient's compliance with the parallel sections of the EHA regulation.

Example 3:

Facts: On the basis of an appropriate evaluation that identified speech problems, a psychological disorder, and a specific learning disability, a recipient provides speech, reading, and psychological services. A month later, an IEP document is signed specifying the services that will be provided: three hours per week of speech therapy, one hour per week of psychological counseling, and five hours per week of special reading instruction. The child receives the reading and psychological services as specified, but receives only two hours per week of speech therapy.

Analysis: The recipient has violated the Section 504 regulation at § 104.33(b). The violation is not that the recipient failed to fully implement the IEP document. The violation, under Section 504, is the failure to provide the services that the recipient identified, through the appropriate process, as necessary for that child. The recipient must make a determination of the child's needs for educational services and related aids, and the IEP document ordinarily is the source of evidence that an appropriate determination was made of those needs, meeting the individualization requirements of § 104.33 and the evaluation and placement requirements of §§ 104.34 and 104.35. This recipient has determined the needs appropriately but has not met those needs. OCR should not analyze the facts in terms of imperfections in or deviations from the IEP document. However, this does not mean that OCR makes an independent judgment of the child's needs; nor does it mean that OCR substitutes its judgment for the recipient's in determining need. Further, Section 504 does not require that an IEP document be in place before the appropriately determined services are provided, even though the EHA regulation requires that the IEP be in effect prior to provision of services. (§ 300.342.) The required process is the one prescribed by the Section 504 regulation at §§ 104.34 - 104.36.

Example 4:

Facts: A handicapped child has an IEP that has not been signed by her parent or teacher and that has not been formally reviewed for 13 months. The EHA requires an annual IEP review, attended by a person qualified to supervise or provide special education other than the child's teacher, the child's teacher, and the child's parent. (34 C.F.R. § 300.344.)

Analysis: The mere fact that the IEP document lacks certain signatures would not violate either the EHA nor Section 504. Absent further allegations, for example, that the educational services no longer meet the child's needs, or that there may be a pattern of unreasonable delays in evaluating and placing students, the fact that the IEP has not been reviewed in 13 months would not constitute a violation of Section 504. As in all decisions made by OCR, reasonableness and the totality of the circumstances should be considered.

Example 5

Facts: A multiply handicapped child's IEP specifies that speech, language, and occupational services, and remedial mathematics will be provided. The IEP does not include annual long-term goals and short-term objectives or the number of minutes per week or days per week for speech and language services. However, the child receives speech, language, and occupational services, and remedial mathematics on a regular basis.

Analysis: These facts alone do not establish a violation of Section 504. In a case like this, when the information needed does not appear in the IEP document, OCR must look beyond the IEP document to determine whether the school district has identified the child's needs, described the necessary program somewhere, and provided services in amounts that the district has determined are necessary, according to the process requirements of the Section 504 regulation. The Section 504 regulation at § 104.33, by implication, requires that needs and services be identified with sufficient specificity (not necessarily in the IEP document) to assure OCR that the child's needs have been decided on an individual basis. Further, the procedural provisions at § 104.36 require that parents have notice (not necessarily in writing) of actions regarding their child's evaluation, placement, and services. However, the facts should not be analyzed in terms of the detail and completeness of the IEP document, according to standards specified in the EHA regulation, as Section 504 does not require development of an IEP document. While the content of the IEP document is the most important piece of evidence, if the information is not there, OCR must go further to determine whether the decisions regarding the amount of time necessary for each service were made at all, and, if so, if they were made properly through the evaluation process. Note that this does not mean that the recipient must meet a need identified by an individual participant in an IEP meeting; nor does it mean that OCR makes an independent determination of services needed. The conclusion of the IEP committee ordinarily indicates the recipient's determination of the child's needs.

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EVALUATION/REEVALUATION

The EHA regulation is more specific than the Section 504 regulation about the evaluation process. The EHA regulation requires that children be reevaluated "every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation." (§ 300.534.) In contrast, Section 504 requires evaluation of any child believed to need special education before initial placement and any significant change in placement. (§ 104.35(a).) Further, it requires "periodic reevaluation," adding that a reevaluation procedure consistent with the EHA is one means of meeting this requirement. (§ 104.35(d).)

Example 6

Facts: A student remains in a placement for three years and one month without a full reevaluation, although reevaluations are conducted in specific areas, as necessary, and services in those areas are altered in response to apparent needs. The EHA requires that handicapped children in special education be reevaluated every three years, and the State Plan under Part B of the EHA specifies that handicapped children will be reevaluated every three years.

Analysis: Even though the recipient has made known its intention to meet the requirements of the EHA, and the EHA requires reevaluation every three years, the failure to conduct a reevaluation after three years and one month does not automatically violate Section 504. The Section 504 regulation requires "periodic reevaluations." The state's adoption of the EHA three-year standard is evidence that the state considers three years to be the appropriate standard for "periodic reevaluations." However, OCR's analysis should not be in terms of deviations from the EHA standard; it should be in terms of a failure to evaluate students periodically, the Section 504 standard.

Example 7

Facts: A child is evaluated, identified as trainable mentally retarded, and placed in a self-contained classroom in a regular public school. The child's IEP calls for interaction with nonhandicapped children at lunch and music. In accordance with new IEPs, developed by appropriately knowledgeable persons, but without benefit of reevaluation, the next year all trainable mentally retarded children from that program are placed in a separate school for handicapped children only. The state permits a change in placement based on an evaluation that is one to three years old.

Analysis: Although no attempt is made here to define a "significant" change in placement, a change from placement in a regular public school with contact with nonhandicapped children to a school for handicapped children only is plainly significant. The recipient in this case has violated Section 504 by making a significant change in the child's placement without reevaluating her. Moreover, the fact that placements of <u>all</u> trainable mentally retarded students are changed is

some indication that placement decisions were not made on an individual basis. The fact that the new placement is contained in an IEP document that meets the state's specific procedural requirements for the EHA does not ensure compliance with Section 504 evaluation requirements.

DUE PROCESS

The Section 504 regulation at § 104.36 requires that recipients provide procedural safeguards regarding identification, evaluation, and placement of persons who, because of handicap, need or are believed to need special instruction or related services. This requires examining official policies and procedures, as well as the application of the policies and procedures to individual students. The only procedural safeguards specified in Subpart D of the Section 504 regulation are provided at 34 C.F.R. § 104.36:

> [N]otice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

Although compliance with EHA procedural safeguards is one way to comply with procedural requirements of Section 504, deviations from procedural safeguards specified at Subpart E of the EHA regulation do not necessarily equate with violations of Section 504, even if the recipient specifies that it intends to comply with Section 504 by complying with the procedural requirements of the EHA. Under Section 504, due process procedures must meet the standard quoted above. Parents must have notice (not necessarily in writing) of actions regarding the identification, evaluation, and placement of their children. Parents also must have a right to an impartial hearing regarding their child's evaluation or placement. They must have an opportunity to examine relevant records and to be represented by counsel at the hearing. A procedure must be available for a higher level review of the hearing decision.

OCR should evaluate the procedures offered in a particular case to determine whether they meet these requirements. OCR would determine whether parents were notified of their due process rights, for example, when a recipient refused to evaluate their child, whether they were permitted to examine records, whether the hearing officer was impartial, whether the parents were permitted counsel, and whether an impartial review process was provided.

Example 8

Facts: A parent requests access to her son's records, and a staff member gives her a report containing the names and confidential information about other children. Subpart E of the EHA regulation requires that participating agencies protect the confidentiality of personally identifiable information. (§ 300.572.)

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Analysis: The Section 504 regulation contains no confidentiality requirement. It is immaterial that the recipient states that it will comply with Section 504 by complying with the procedural requirements of the EHA. Allegations of breach of confidentiality should be referred to OSERS and to the Family Educational Rights and Privacy Act Office in the Department of Education.

CONCLUSION

In sum, compliance with Section 504 must be determined on the basis of an analysis of the facts in accordance with standards contained in the Section 504 regulation. While compliance with certain provisions of the EHA is one way to comply with Section 504, noncompliance with the EHA is not automatically noncompliance with Section 504. Nor is compliance with the EHA automatic compliance with Section 504, except for those three sections mentioned specifically in the Section 504 regulation. Under no circumstances should OCR imply that it provides an official interpretation of the EHA or that it makes findings under the EHA.

If you have any questions about the content of this memorandum, you may contact me or have a member of your staff contact Jean Peelen at 732-1641.

copy ocr staff

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202

JAN 28 1991

TO : OCR Senior Staff

FROM : Richard D. Komer
Deputy Assistant Secretary
for Policy

SUBJECT: Changes made by the Americans with Disabilities Act to the Definition of Handicapped Person under the Rehabilitation Act

The Americans with Disabilities Act (ADA), P.L. 101-336, signed by President Bush on July 26, 1990, amended Section 7(8) of the Rehabilitation Act of 1973 with consequences relevant to OCR and recipients subject to its jurisdiction.

First, the definition of individual with handicaps is narrowed to exclude persons ". . . currently engaging in the illegal use of drugs. . . ." Second, this exclusionary language is limited to allow former users, or those participating in drug rehabilitation programs, to qualify as persons with handicaps. Third, local educational agencies are explicitly authorized to take disciplinary action against handicapped students using drugs or alcohol to the same extent as they may take action against nonhandicapped students, and the due process safeguards required by 34 C.F.R. 104.36 are specifically declared inapplicable to such proceedings.

The amendment reads, in pertinent part:

> C)(i) For purposes of title V, the term "individual with handicaps" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.
>
> (ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who --
>
> > (I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
> >
> > (II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
> >
> > (III) is erroneously regarded as engaging in such use,

but is not engaging in such use; except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) and (II) is no longer engaging in the illegal use of drugs.

(iii) Notwithstanding clause (i), for purposes and activities providing health services and services provided under Title I, II, and III, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

(iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 C.F.R. 104.36 shall not apply to such disciplinary actions.

(v) For purposes of Sections 503 and 504 as such Sections relate to employment, the term "individual with handicaps" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

(D) For the purpose of Sections 793 and 794 of this Title, as such Sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

. . .

(22)(A) The term "drug" means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 812).

(B) The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include

> the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

This memo compares the new language with the current OCR Section 504 regulation and policy and notes potential conflicts.[1]

Currently Engaging in the Illegal Use of Drugs.

The definition of individual with handicaps in the Section 504 statute, adopted in 1974, which was supplemented with the second sentence regarding employment in 1978, read as follows:

> (B) Subject to the second sentence of this subparagraph, the term "individual with handicaps" means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of Sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. P.L. 95-602 §122(a), 92 Stat 2955, 2984-85 (1978).

The regulations at 34 C.F.R., Part 104, which implement this language do not contain any reference to drug addicts or alcoholics. However, Appendix A of the regulation says:

> The Secretary has carefully examined the issue [of whether to include drug addicts and alcoholics within the definition of handicapped person] and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of Section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for

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[1] Most provisions of the ADA do not become effective for 18 to 24 months in order to allow for an orderly transition into full compliance. However, Title 5, which contains the changed definition, has no stated effective date and consequently became effective on July 26, 1990.' Lapeyre v. U.S., 19 Wall (US) 191, 21 L.Ed. 606 (1873); 73 Am. Jur. 2d, Statutes Section 361.

therefore believes that he is without authority to exclude these conditions from the definition. 34 C.F.R. Part 104, Appendix A, p. 386.

There are two matters to note. First, the new definition distinguishes current use from the status of drug addiction. In the Subsection following the new definition the Congress provided that a person undergoing treatment for drug addiction could, if they are no longer using drugs, become a person with handicaps. Thus, by prohibiting current use the new definition penalizes a subset of behaviors of the condition of drug addiction, not the condition itself. Since drug addiction, accompanied by non-use remains a condition covered by the Rehabilitation Act, the new definition does not conflict with the policy that regards drug addiction as a handicap. The legal question of whether the new definition is so inconsistent with the policy that that policy has no further force and effect,[2] in this instance can be answered in the negative. The two can be reconciled.

However, the new emphasis on current drug use is inconsistent with Appendix A's description of how drug abusers are to be treated by recipients providing employment and services other than employment (that is, elementary and secondary and postsecondary educational services).

Currently Engaging in the Illegal Use of Drugs -- Employment.

The new definition conflicts with current policy in employment matters. As noted in the preceding section, the regulations do not mention drug abusers or alcoholics in relation to employment. But Appendix A, in explaining the policy on employment of drug addicts and alcoholics, provides that

> With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider -- for all applicants including drug addicts and alcoholics -- past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the

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[2] U.S. v. Larinonoff, 431 U.S. 864, 97 S.Ct. 2150 (1977) (Navy regulation divesting rights to re-enlistment bonus struck down for inconsistency with both old and new compensation statutes); 2 Am. Jur. 2d, Administrative Law 300.

> possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees. 34 C.F.R. Part 104, Appendix A, p. 386.

The new definition eliminates the need for this review of behavior as it pertains to drug users.[3] If a drug addict is "currently" using drugs, an employer may, on that basis, choose not to employ (or may discipline or discharge a person already employed) without considering whether that person is able to perform the duties of the job or whether that person constitutes a threat to others. In other words, a current drug user can never be a qualified handicapped person because a current drug user can never be handicapped.

Under the previously described rule for measuring the impact of statutory enactments on existing regulations, the policy expressed in the Section 504 Appendix, that grants some protection under the Rehabilitation Act to current drug user employees cannot have any further effect, since it cannot be reconciled with the new definition.[4]

Currently Engaging in the Illegal Use or Possession of Drugs or Alcohol - Elementary and Secondary Education.

Section 512(a) of the ADA also adds a new subsection to the Rehabilitation Act that allows local educational agencies to take

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[3] The ADA does not change the status of alcoholics in regard to employment. A new subsection (v) is added to subsection 7(9), which re-enacts these same (Appendix) standards for alcoholics. The new subsection reads as follows:

> For purposes of sections 503 and 504 as such sections relate to employment, the term "individual with handicaps" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

[4] Certain court decisions construing the term "person with handicaps" in employment cases involving drug addicts had already determined that current users had no rights under the Rehabilitation Act, Burka v. New York City Transit Authority, 680 F. Supp. 590, (S.D. N.Y., 1988); Davis v. Bucher, 451 F. Supp. 791 (D.C. Pa., 1978). However, the Supreme Court has merely noted that the 1978 amendment regarding drug abusers was not "free of ambiguity", New York City Transit Authority v. Beazer, 440 U.S. 568, 582; 99 S. Ct. 1355, 1363; 59 L. Ed. 2d 587 (1979).

disciplinary action against handicapped students to the same extent as it would take action against nonhandicapped students, as follows:

> (iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently is engaging in the illegal use of drugs or in the use of alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 C.F.R. 104.36 shall not apply to such disciplinary actions.[5]

The regulations have no direct counterpart to these disciplinary strictures, but Appendix A states that

> Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students. 34 C.F.R. Part 104, Appendix A, p. 387.

Under this language, OCR has issued policy guidance which recognizes that students who are handicapped by drug addiction or alcoholism may be disciplined to the same extent as other students, but that a student who is handicapped by some other condition in addition to drug addiction or alcoholism must be evaluated and afforded due process prior to disciplinary action that would constitute a significant change in placement.[6]

The new subsection added by the ADA allows a local educational agency to discipline persons who are engaging in the illegal use of drugs or the use of alcohol, who are handicapped by conditions other than drug addiction or alcoholism, for possession or use of

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[5] Please note that in the area of elementary and secondary education the amendment affects current use of both drugs and alcohol.

[6] Memorandum to OCR Senior Staff, October 28, 1988, "Long-term Suspension or Expulsion of Handicapped Students", PES Document Number 168. See also School Board of Prince William County Virginia v. Malone, (E.D. Va. 1984), 1983-84 EHLR DEC. 555:402, a case in which another handicapping condition was present and the school board's failure to evaluate prior to expulsion for drug possession was held to be a violation of the EHA.

illegal drugs or alcohol without providing the evaluation required by current regulations, and without providing the due process procedure described in the Section 504 regulations. There are several indications that Congress intended this outcome although it did not explicitly say so. The section uses the phrase "handicapped student" which, after having been defined to exclude current users, seems to imply that a handicapped student for purposes of the subsection is one who is handicapped by some other condition. Furthermore, the original Senate version of the ADA contained a provision that read as follows:

> Notwithstanding any other provision of law, but subject to subsection (C) with respect to programs and activities providing education and the last sentence of this paragraph, the term 'individual with a handicap' does not include any individual who currently uses illegal drugs, except that an individual who is otherwise handicapped shall not be excluded from the protections of this Act if such individual also uses or is also addicted to drugs. Cong. Rec., September 12, 1989, p. S10961.

This language was deleted from the final version, and the clear implication is that rights to educational services under the act can be lost by use of drugs or alcohol.

However, under the new subsection, possession of illegal drugs or alcohol does not result in a loss of protections unless the handicapped student is also currently using drugs or alcohol. For example, if a school finds illegal drugs in the locker of a mentally retarded student, they may discipline that student as if he had no handicap only if they can also show that he is currently using drugs. Otherwise they must provide a re-evaluation to determine, among other things, whether the misbehavior was a manifestation of the handicap, as required by current Section 504 policy.

Currently Engaging in the Illegal Use of Drugs -- Postsecondary Education.

In connection with providers of postsecondary education, Appendix A says,

> With respect to other services, the implications of coverage, of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the

> basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students. 34 C.F.R. Part 104, Appendix A, p. 386.

While the new statutory definition does not directly address postsecondary education, it is clear from the text of the amendment that a current drug user may be excluded from postsecondary programs, whether or not he or she is able to successfully participate in the program, is able to abide by the rules, and does not present an impediment to other students. Thus the amendment renders the Appendix statement null and void as applied to current users of drugs.

However, the loss of these rights in all settings is limited to situations in which a recipient "acts on the basis of such use" and if action is taken on another basis, the protections of the act do apply. Senator Harkin, commenting on amendments to the Senate bill, explained that

> . . .current users of illegal drugs, disabled or not, are not protected by this act from actions based on their current use of illegal drugs. At the same time, the fact that a disabled person is a current user of illegal drugs, does not mean that the person is not protected under the act when actions are taken against that individual, not on the basis of the current use of illegal drugs, but on the basis of the disability. Cong. Rec., September 15, 1989, p. S11225.

Summary.

The effect of the new definition of "individual with handicaps" can be summarized as follows:

1. In connection with the provision of educational services, not including employment, current drug users are not covered by the Rehabilitation Act and recipients do not have to consider whether the individual could successfully participate in the program and/or not impede others (this will be applied to postsecondary settings as well as others specifically covered in the amendment);

2. In connection with employment, current drug users are not protected by the Rehabilitation Act and recipients do not have to show that such an individual could perform the duties of the job and/or not imperil others;

3. If an individual is undergoing drug rehabilitation and

is no longer using drugs, that person may not be excluded from the receipt of services and recipients are still required to judge whether that individual is a "qualified" handicapped individual;

4. There is no change in the treatment of alcoholics, except as noted below;

5. Local educational agencies may discipline a student who is handicapped by drug addiction or alcoholism, as well as by any other condition, and is using drugs or alcohol, for use or possession of illegal drugs and use or possession of alcohol without liability under the Rehabilitation Act provided that the disciplinary action is co-extensive with discipline of nonhandicapped students; and

6. Local educational agencies are not required to provide due process in such disciplinary actions.

If you have any questions about the content of this memorandum, feel free to call me or have a member of your staff contact Jean Peelen at 732-1641.

PREPARED BY: PES:ESEB:KHakel:cew:11/08/90:732-1641
revised:cew:12/05/90

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
THE ASSISTANT SECRETARY

MEMORANDUM

SEP 16 1991

DATE :

TO : Chief State School Officers

FROM : Robert R. Davila
Assistant Secretary
Office of Special Education
and Rehabilitative Services

Michael L. Williams
Assistant Secretary
Office for Civil Rights

John T. MacDonald
Assistant Secretary
Office of Elementary
and Secondary Education

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SUBJECT: Clarification of Policy to Address the Needs of Children with Attention Deficit Disorders within General and/or Special Education

I. Introduction

There is a growing awareness in the education community that attention deficit disorder (ADD) and attention deficit hyperactive disorder (ADHD) can result in significant learning problems for children with those conditions.[1] While estimates of the prevalence of ADD vary widely, we believe that three to five percent of school-aged children may have significant educational problems related to this disorder. Because ADD has broad implications for education as a whole, the Department believes it should clarify State and local responsibility under Federal law for addressing the needs of children with ADD in the schools. Ensuring that these students are able to reach their fullest potential is an inherent part of the National education goals and AMERICA 2000. The National goals, and the strategy for achieving them, are based on the assumptions that: (1) all children can learn and benefit from their education; and (2) the educational community must work to improve the learning opportunities for all children.

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[1] While we recognize that the disorders ADD and ADHD vary, the term ADD is being used to encompass children with both disorders.

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This memorandum clarifies the circumstances under which children with ADD are eligible for special education services under Part B of the Individuals with Disabilities Education Act (Part B), as well as the Part B requirements for evaluation of such children's unique educational needs. This memorandum will also clarify the responsibility of State and local educational agencies (SEAs and LEAs) to provide special education and related services to eligible children with ADD under Part B. Finally, this memorandum clarifies the responsibilities of LEAs to provide regular or special education and related aids and services to those children with ADD who are not eligible under Part B, but who fall within the definition of "handicapped person" under Section 504 of the Rehabilitation Act of 1973. Because of the overall educational responsibility to provide services for these children, it is important that general and special education coordinate their efforts.

II. Eligibility for Special Education and Related Services under Part B

Last year during the reauthorization of the Education of the Handicapped Act [now the Individuals with Disabilities Education Act], Congress gave serious consideration to including ADD in the definition of "children with disabilities" in the statute. The Department took the position that ADD does not need to be added as a separate disability category in the statutory definition since children with ADD who require special education and related services can meet the eligibility criteria for services under Part B. This continues to be the Department's position.

No change with respect to ADD was made by Congress in the statutory definition of "children with disabilities;" however, language was included in Section 102(a) of the Education of the Handicapped Act Amendments of 1990 that required the Secretary to issue a Notice of Inquiry (NOI) soliciting public comment on special education for children with ADD under Part B. In response to the NOI (published November 29, 1990 in the Federal Register), the Department received over 2000 written comments, which have been transmitted to the Congress. Our review of these written comments indicates that there is confusion in the field regarding the extent to which children with ADD may be served in special education programs conducted under Part B.

A. Description of Part B

Part B requires SEAs and LEAs to make a free appropriate public education (FAPE) available to all eligible children with disabilities and to ensure that the rights and protections of Part B are extended to those children and their parents. 20 U.S.C. 1412(2); 34 CFR §§300.121 and 300.2. Under Part B, FAPE, among other elements, includes the provision of special education and related services, at no cost to parents, in

conformity with an individualized education program (IEP). 34 CFR §300.4.

In order to be eligible under Part B, a child must be evaluated in accordance with 34 CFR §§300.530-300.534 as having one or more specified physical or mental impairments, and must be found to require special education and related services by reason of one or more of these impairments.[2] 20 U.S.C. 1401(a)(1); 34 CFR §300.5. SEAs and LEAs must ensure that children with ADD who are determined eligible for services under Part B receive special education and related services designed to meet their unique needs, including special education and related services needs arising from the ADD. A full continuum of placement alternatives, including the regular classroom, must be available for providing special education and related services required in the IEP.

B. Eligibility for Part B services under the "Other Health Impaired" Category

The list of chronic or acute health problems included within the definition of "other health impaired" in the Part B regulations is not exhaustive. The term "other health impaired" includes chronic or acute impairments that result in limited alertness, which adversely affects educational performance. Thus, children with ADD should be classified as eligible for services under the "other health impaired" category in instances where the ADD is a chronic or acute health problem that results in limited alertness, which adversely affects educational performance. In other words, children with ADD, where the ADD is a chronic or acute health problem resulting in limited alertness, may be considered disabled under Part B solely on the basis of this disorder within the "other health impaired" category in situations where special education and related services are needed because of the ADD.

C. Eligibility for Part B services under Other Disability Categories

Children with ADD are also eligible for services under Part B if the children satisfy the criteria applicable to other disability categories. For example, children with ADD are also eligible for services under the "specific learning disability" category of

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[2] The Part B regulations define 11 specified disabilities. 34 CFR §300.5(b)(1)-(11). The Education of the Handicapped Act Amendments of 1990 amended the Individuals with Disabilities Education Act [formerly the Education of the Handicapped Act] to specify that autism and traumatic brain injury are separate disability categories. See section 602(a)(1) of the Act, to be codified at 20 U.S.C. 1401(a)(1).

Part B if they meet the criteria stated in §§300.5(b)(9) and 300.541 or under the "seriously emotionally disturbed" category of Part B if they meet the criteria stated in §300.5(b)(8).

III. Evaluations under Part B

A. Requirements

SEAs and LEAs have an affirmative obligation to evaluate a child who is suspected of having a disability to determine the child's need for special education and related services. Under Part B, SEAs and LEAs are required to have procedures for locating, identifying and evaluating all children who have a disability or are suspected of having a disability and are in need of special education and related services. 34 CFR §§300.128 and 300.220. This responsibility, known as "child find," is applicable to all children from birth through 21, regardless of the severity of their disability.

Consistent with this responsibility and the obligation to make FAPE available to all eligible children with disabilities, SEAs and LEAs must ensure that evaluations of children who are suspected of needing special education and related services are conducted without undue delay. 20 U.S.C. 1412(2). Because of its responsibility resulting from the FAPE and child find requirements of Part B, an LEA may not refuse to evaluate the possible need for special education and related services of a child with a prior medical diagnosis of ADD solely by reason of that medical diagnosis. However, a medical diagnosis of ADD alone is not sufficient to render a child eligible for services under Part B.

Under Part B, before any action is taken with respect to the initial placement of a child with a disability in a program providing special education and related services, "a full and individual evaluation of the child's educational needs must be conducted in accordance with requirements of §300.532." 34 CFR §300.531. Section 300.532(a) requires that a child's evaluation must be conducted by a multidisciplinary team, including at least one teacher or other specialist with knowledge in the area of suspected disability.

B. Disagreements over Evaluations

Any proposal or refusal of an agency to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child is subject to the

written prior notice requirements of 34 CFR §§300.504-300.505.[3] If a parent disagrees with the LEA's refusal to evaluate a child or the LEA's evaluation and determination that a child does not have a disability for which the child is eligible for services under Part B, the parent may request a due process hearing pursuant to 34 CFR §§300.506-300.513 of the Part B regulations.

IV. Obligations Under Section 504 of SEAs and LEAs to Children with ADD Found Not To Require Special Education and Related Services under Part B

Even if a child with ADD is found not to be eligible for services under Part B, the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 CFR Part 104 may be applicable. Section 504 prohibits discrimination on the basis of handicap by recipients of Federal funds. Since Section 504 is a civil rights law, rather than a funding law, its requirements are framed in different terms than those of Part B. While the Section 504 regulation was written with an eye to consistency with Part B, it is more general, and there are some differences arising from the differing natures of the two laws. For instance, the protections of Section 504 extend to some children who do not fall within the disability categories specified in Part B.

A. Definition

Section 504 requires every recipient that operates a public elementary or secondary education program to address the needs of children who are considered "handicapped persons" under Section

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[3] Section 300.505 of the Part B regulations sets out the elements that must be contained in the prior written notice to parents:

> (1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;
> (2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;
> (3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and
> (4) A description of any other factors which are relevant to the agency's proposal or refusal.

34 CFR §300.505(a)(1)-(4).

504 as adequately as the needs of nonhandicapped persons are met. "Handicapped person" is defined in the Section 504 regulation as any person who has a physical or mental impairment which substantially limits a major life activity (e.g., learning). 34 CFR §104.3(j). Thus, depending on the severity of their condition, children with ADD may fit within that definition.

B. Programs and Services Under Section 504

Under Section 504, an LEA must provide a free appropriate public education to each qualified handicapped child. A free appropriate public education, under Section 504, consists of regular or special education and related aids and services that are designed to meet the individual student's needs and based on adherence to the regulatory requirements on educational setting, evaluation, placement, and procedural safeguards. 34 CFR §§104.33, 104.34, 104.35, and 104.36. A student may be handicapped within the meaning of Section 504, and therefore entitled to regular or special education and related aids and services under the Section 504 regulation, even though the student may not be eligible for special education and related services under Part B.

Under Section 504, if parents believe that their child is handicapped by ADD, the LEA must evaluate the child to determine whether he or she is handicapped as defined by Section 504. If an LEA determines that a child is not handicapped under Section 504, the parent has the right to contest that determination. If the child is determined to be handicapped under Section 504, the LEA must make an individualized determination of the child's educational needs for regular or special education or related aids and services. 34 CFR §104.35. For children determined to be handicapped under Section 504, implementation of an individualized education program developed in accordance with Part B, although not required, is one means of meeting the free appropriate public education requirements of Section 504.[4] The child's education must be provided in the regular education classroom unless it is demonstrated that education in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §104.34.

Should it be determined that the child with ADD is handicapped for purposes of Section 504 and needs only adjustments in the regular classroom, rather than special education, those adjustments are required by Section 504. A range of strategies is available to meet the educational needs of children with ADD.

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[4]Many LEAs use the same process for determining the needs of students under Section 504 that they use for implementing Part B.

Regular classroom teachers are important in identifying the appropriate educational adaptions and interventions for many children with ADD.

SEAs and LEAs should take the necessary steps to promote coordination between special and regular education programs. Steps also should be taken to train regular education teachers and other personnel to develop their awareness about ADD and its manifestations and the adaptations that can be implemented in regular education programs to address the instructional needs of these children. Examples of adaptations in regular education programs could include the following:

> providing a structured learning environment; repeating and simplifying instructions about in-class and homework assignments; supplementing verbal instructions with visual instructions; using behavioral management techniques; adjusting class schedules; modifying test delivery; using tape recorders, computer-aided instruction, and other audio-visual equipment; selecting modified textbooks or workbooks; and tailoring homework assignments.

Other provisions range from consultation to special resources and may include reducing class size; use of one-on-one tutorials; classroom aides and note takers; involvement of a "services coordinator" to oversee implementation of special programs and services, and possible modification of nonacademic times such as lunchroom, recess, and physical education.

Through the use of appropriate adaptations and interventions in regular classes, many of which may be required by Section 504, the Department believes that LEAs will be able to effectively address the instructional needs of many children with ADD.

C. <u>Procedural Safeguards Under Section 504</u>

Procedural safeguards under the Section 504 regulation are stated more generally than in Part B. The Section 504 regulation requires the LEA to make available a system of procedural safeguards that permits parents to challenge actions regarding the identification, evaluation, or educational placement of their handicapped child whom they believe needs special education or related services. 34 CFR §104.36. The Section 504 regulation requires that the system of procedural safeguards include notice, an opportunity for the parents or guardian to examine relevant records, an impartial hearing with opportunity for participation by the parents or guardian and representation by counsel, and a

review procedure. Compliance with procedural safeguards of Part B is one means of fulfilling the Section 504 requirement.[3] However, in an impartial due process hearing raising issues under the Section 504 regulation, the impartial hearing officer must make a determination based upon that regulation.

V. Conclusion

Congress and the Department have recognized the need to provide information and assistance to teachers, administrators, parents and other interested persons regarding the identification, evaluation, and instructional needs of children with ADD. The Department has formed a work group to explore strategies across principal offices to address this issue. The work group also plans to identify some ways that the Department can work with the education associations to cooperatively consider the programs and services needed by children with ADD across special and regular education.

In fiscal year 1991, the Congress appropriated funds for the Department to synthesize and disseminate current knowledge related to ADD. Four centers will be established in Fall, 1991 to analyze and synthesize the current research literature on ADD relating to identification, assessment, and interventions. Research syntheses will be prepared in formats suitable for educators, parents and researchers. Existing clearinghouses and networks, as well as Federal, State and local organizations will be utilized to disseminate these research syntheses to parents, educators and administrators, and other interested persons.

In addition, the Federal Resource Center will work with SEAs and the six regional resource centers authorized under the Individuals with Disabilities Education Act to identify effective identification and assessment procedures, as well as intervention strategies being implemented across the country for children with ADD. A document describing current practice will be developed and disseminated to parents, educators and administrators, and other interested persons through the regional resource centers network, as well as by parent training centers, other parent and consumer organizations, and professional organizations. Also, the Office for Civil Rights' ten regional offices stand ready to provide technical assistance to parents and educators.

It is our hope that the above information will be of assistance to your State as you plan for the needs of children with ADD who require special education and related services under Part B, as well as for the needs of the broader group of children with ADD

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[3]Again, many LEAs and some SEAs are conserving time and resources by using the same due process procedures for resolving disputes under both laws.

who do not qualify for special education and related services under Part B, but for whom special education or adaptations in regular education programs are needed. If you any questions, please contact Jean Peelen, Office for Civil Rights; (Phone: 202/732-1635), Judy Schrag, Office of Special Education Programs (Phone: 202/732-1007); or Dan Bonner, Office of Elementary and Secondary Education (Phone: 202/401-0984).

Appendix C

COMPARISON IDEA/SECTION 504/ADA

5.0 COMPARISON/CONTRAST
IDEA/SECTION 504/ADA

COMPONENT	IDEA	SECTION 504	ADA
General Purpose	Is federal funding statute whose purpose is to provide financial aid to states in their efforts to ensure adequate and appropriate services for disabled children.	Is broad civil rights law which protects the rights of individuals with disabilities in programs and activities that receive federal financial assistance from the U.S. Department of Education.	Covers all employers with 15 or more employees; adds one-year exemption for employers with fewer than 25 employees.
Who is Protected?	Identifies all school-aged children who qualify for service under one/more of 13 disabilities.	Identifies all school-age children as disabled who meet the definition. The child has or has had a physical or mental impairment which substantially limits a major life activity, or is regarded as disabled by others. Major life activities include walking, seeing, hearing, speaking, breathing, learning, working, caring for oneself and performing tasks. The condition need only substantially limit one major life activity in order for the student to be eligible.	
		A disabled person who, with reasonable accommodation, can perform the essential functions of the job.	An individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position.
Reasonable Accommodation		Making facilities used by employees readily accessible and usable by persons with disabilities.	Making facilities readily accessible.
		Job restructuring, part-time or modified work schedules.	Job restructuring, part-time or modified work schedules.
		(No comparable provision.)	Reassignment to a vacant position.
		Acquisition or modification of equipment or devices.	Acquisition or modification of equipment or devices.
		(No comparable provision.)	Appropriate adjustment or modification of examinations, training materials, or policies.
		Provision of readers or interpreters.	Provision of readers or interpreters.

COMPONENT	IDEA	SECTION 504	ADA
Undue Hardship		Size of the program and its budget, type of operation, nature and cost of accommodation.	Size of the business and its budget, type of operation, nature and cost of accommodation.
Responsibility to FAPE	Both laws require the provision of a free appropriate public education to eligible students.		
	Requires a written IEP document with specified participants at the IEP meeting.	Does not require a written IEP document but does require a written plan. It is recommended that a group of persons knowledgeable about the student, evaluation data and placement options convene and specify services.	
	"Appropriate education" means a program designed to provide "educational benefit." Related services are provided if required for the student to benefit from specially designed instruction.	"Appropriate" means an education with accommodations, comparable to the education provided to non-disabled students. Related services may be necessary for making reasonable accommodations.	
Special Education vs. Regular Education	A student is only eligible to receive IDEA services if the child study team determines that the student has a disability under one of the 13 qualifying conditions and requires specially designed instruction to benefit from education.	A student is eligible so long as the student meets the definition of qualified person. It is not required that the disability adversely affect educational performance, or that the student need special education in order to be protected.	
Drug and Alcohol Use		Current drug use is not considered a disability.	Current drug use is not considered a disability.
		Current alcohol abuse that prevents individuals from performing duties of the job or that constitutes direct threat to property or safety of others is not considered a disability.	Current alcohol abuse that prevents individuals from performing duties of the job or that constitutes direct threat to property or safety of others is not considered a disability.
Contagious Diseases		Individual with disabilities excludes any individual with a contagious disease which renders the individual unable to perform the job.	Permits qualification standard requiring that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of others.

COMPONENT	IDEA	SECTION 504	ADA
Funding	Provides additional funding for eligible students.	Does not provide additional funds. IDEA funds may not be used to serve children found eligible only under Section 504.	
Program Accessibility	Requires that modifications must be made if necessary to provide access to a free appropriate education.	Has regulations regarding building accessibility. Requires that reasonable accommodations be made.	
Procedural Standards	Both require notice to the parent or guardian with respect to identification, evaluation and/or placement.		
	Requires written notice.	Does not require written notice.	
	Delineates required components of written notice.	Components not delineated.	
	Requires written notice prior to any change in placement.	Requires notice only before a "significant" change in placement.	
Evaluations	A full comprehensive evaluation assessing all areas related to the suspected disability is required. The child is evaluated by a multidisciplinary team or group.	A full comprehensive evaluation and multidisciplinary team are not required.	
	Requires consent before an initial evaluation is conducted.	Does not require consent, only notice.	
	Requires reevaluations to be conducted at least every three years.	Requires periodic reevaluations.	
	A reevaluation is not required before a change in placement.	Reevaluation is required before a "significant" change in placement	
	Provides for independent educational evaluations.	(No provision.)	

COMPONENT	IDEA	SECTION 504	ADA
Placement Procedures	When interpreting evaluation data and making placement decisions, both laws require districts to: *Draw upon information from a variety of sources.* *Assure that all information is documented and considered.* *Ensure that the placement decision is made by a group of persons including those who are knowledgeable about the child, the meaning of the evaluation data and placement options.* *Ensure that the student is educated with his/her nondisabled peers to the maximum extent appropriate (Least Restrictive Environment—LRE).*		
	An IEP review meeting is required before any change in placement.	Not required.	
Grievance Procedure	Requires neither grievance procedure, nor compliance officer.	Requires districts with more than 15 employees to designate an employee responsible for assuring district compliance with Section 504 and to provide a grievance procedure for parents, students and employees.	
Due Process	Both statutes require districts to provide impartial hearings for parents or guardians who disagree with the identification, evaluation, or placement of a student with disabilities.		
	Delineates specific requirements.	Requires that the parent have an opportunity to participate and be represented by counsel. Policy left to the discretion of the local school district. Policy statements should clarify specific details.	
Exhaustion	Requires the parent/guardian to pursue administrative hearing before seeking redress in the courts.	Complaint may be filed with the Office of Civil Rights (OCR) without exhausting IDEA procedures.	
Enforcement	Enforced by the U.S. Office of Special Education Programs (OSEP). Compliance monitored by the State Department of Education and the Office of Special Education Programs.	Enforced by the U.S. Office of Civil Rights (OCR).	
	The State Department of Education resolves complaints.	State Department of Education has a complaint resolution process but it need not be exhausted before going to OCR.	

Appendix D

ADDITIONAL REFERENCES

Sample Classroom/Facility Accommodations

As local districts develop policies and procedures for guiding referral and identification of students determined to be disabled under Section 504, it is critical that information concerning this law and its impact on local school districts be shared with principals and building-level staff. The intent of Section 504 is to "accommodate" for differences within the regular education environment. For this to be accomplished, all staff must be provided with awareness activities and given specific information concerning the district's procedures for dealing with Section 504 referrals.

As individual students are identified the classroom teacher may need specific training in the area of the identified disability. The following classroom/facility accommodations are presented as examples of ways in which Section 504 disabilities may be successfully addressed within regular education.

Communication

Modify parent/student/teacher communications.

- Develop a daily/weekly journal
- Develop parent/student/school contacts
- Schedule periodic parent/teacher meetings
- Provide parents with duplicate sets of text

Modify staff communications.

- Identify resource staff
- Network with other staff
- Schedule building team meetings
- Maintain ongoing communication with building principal

Modify school/community agency communication.

- Identify and communicate with appropriate agency personnel working with student
- Assist in agency referrals
- Provide appropriate carryover in the school environment

Organization/Management

Modify the instructional day.

- Allow student more time to pass in hallways
- Modify class schedule

Modify the classroom organization/structure.

- Adjust placement of student within classroom (e.g., study carrel, proximity to teacher, etc.)

Increase/decrease opportunity for movement
Determine appropriate classroom assignment (e.g., open versus structured)
Reduce stimuli

Modify the district's policies/procedures.

Allow increase in number of excused absences for health reasons
Adjust transportation/parking arrangements
Approve early dismissal for service agency appointments

Alternative Teaching Strategies

Modify teaching methods.

Adjust testing procedures (e.g., length of time, administer orally, tape record answers)
Individualize classroom/homework assignments
Utilize technology (computers, tape recorders, calculators, etc.)

Modify materials. For example:

Utilize legible materials (i.e., scratch the dittos?)
Utilize materials that address the student's learning style (e.g., visual, tactile, auditory, etc.)
Adjust reading level of materials

Student Precautions

Modify the classroom/building climate for health purposes.

Use an air purifier in classroom
Control temperature
Accommodate specific allergic reactions

Modify classroom/building to accommodate equipment needs.

Plan for evacuation for wheelchair-bound students
Schedule classes in accessible areas

Modify building health/safety procedures.

Administer medication
Apply universal precautions
Accommodate special diets

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

APR 29 1992

Dear Colleague:

Secretary of Education Lamar Alexander has committed the Department of Education to sending the strongest possible signal that education is the door to opportunity for all Americans. The Department's AMERICA 2000 strategy is designed to help communities educate all their children well, and to meet world class standards. To help ensure equal educational opportunity for all Americans--which is indispensable to achieving our National Education Goals--the Office for Civil Rights (OCR) will continue its vigorous enforcement of our Federal civil rights statutes and thereby contribute to the achievement of the goals and underlying objectives of AMERICA 2000.

One of the four civil rights laws enforced by OCR is Section 504 of the Rehabilitation Act of 1973, which requires that all children with handicaps be afforded equal educational opportunities in federally funded programs and activities, such as our public schools. Because I feel certain you share my commitment to equal educational opportunity, I am writing to alert you to two compliance problems that are occurring with increased frequency. One concerns the failure to provide comparable facilities and services for students with handicaps. The other concerns shorter instructional school days and longer bus rides for students with handicaps due to transportation scheduling.

I would like to take this opportunity to review with you the requirements of Section 504. (A copy of the regulation is enclosed for your reference.) I also want to share with you specific examples of the kinds and quality of services and treatment provided to students with handicaps that are in violation of Section 504.

The Section 504 regulation states that a recipient may not afford a qualified handicapped person an opportunity to participate in or benefit from any aid, benefit, or service that is not equal to that afforded to others. Thus, facilities provided for students with handicaps must be comparable to those provided for nonhandicapped students. Students with handicaps also must receive an equal opportunity to participate in transportation services. Transportation schedules must not result in these students spending appreciably more time on buses than

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nonhandicapped students, and transportation schedules must be designed to ensure arrival and departure times that do not reduce the length of the school day for students with handicaps for whom a shorter school day has not been prescribed on an individual basis.

A recent review of selected Section 504 letters of findings conducted by my staff revealed that the services and treatment provided to students with handicaps too often were not comparable to those provided to nonhandicapped students. I am concerned that these are not isolated instances; rather, the problems have been found nationwide. A few examples of the types of problems that have been recurring are presented below.

- Classes for students with handicaps were held in storage rooms, home economics rooms, partitioned offices and other areas that were not conducive to an appropriate learning environment.

- Classroom sizes were not adequate to accommodate some of the specific educational, physical, and/or medical needs of students with handicaps.

- Teachers were not provided adequate support or supplies to enable them to give their students an equal education. In some instances, it was found that teachers had to go to unusual lengths to obtain supplies. In one school district, no clerical or secretarial staff was available for teachers of students with handicaps, and teachers had to leave their classes to answer the telephone, while teachers of nonhandicapped students had appropriate clerical assistance.

- Students with handicaps who use bus transportation received an instructional school day substantially shorter than that of nonhandicapped students. In one school district, bus transportation was not provided to a student with a handicap on days when the weather was inclement.

- Some mobility-impaired students did not receive transportation until five months into the school term because the school district did not own an accessible bus.

- Some students with handicaps had school bus rides in excess of four hours and 45 minutes each day because of bus scheduling. These rides were much longer than the bus rides of other students. As a result, many of these handicapped students arrived at school wet. Others became hyperactive and required additional medication.

In each of the examples outlined above, students with handicaps were not provided an education comparable to that provided to nonhandicapped students. I bring these problems to your attention so that we may work cooperatively to ensure that students with handicaps receive the equal educational services and treatment to which they are entitled. State education officials, school administrators, and others responsible for the education of students with handicaps must be aware of these problems and ensure that school districts understand their obligation to provide students with handicaps with facilities and services comparable to those provided to nonhandicapped students. I encourage school districts that are concerned that there may be compliance problems with current or planned programs to contact the appropriate OCR regional office for technical assistance. For your convenience, I am enclosing a list of our regional offices.

I appreciate your attention to this matter.

Sincerely,

Michael L. Williams
Assistant Secretary
for Civil Rights

Enclosures

Region I

Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

Office for Civil Rights, Region I
U.S. Department of Education
J.W. McCormack Post Office and
Courthouse, Room 222, 01-0061
Boston, MA 02109-4557
(617) 223-9662; TDD (617) 223-9695

Region II

New Jersey, New York, Puerto Rico, Virgin Islands

Office for Civil Rights, Region II
U.S. Department of Education
26 Federal Plaza, 33rd Floor
Room 33-130, 02-1010
New York, NY 10278-0082
(212) 264-4633; TDD (212) 264-9464

Region III

Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia

Office for Civil Rights, Region III
U.S. Department of Education
3535 Market Street
Room 6300, 03-2010
Philadelphia, PA 19104-3326
(215) 596-6772; TDD (215) 596-6794

Region IV

Alabama, Florida, Georgia, North Carolina, South Carolina, Tennessee

Office for Civil Rights, Region IV
U.S. Department of Education
Post Office Box 2048, 04-3010
Atlanta, GA 30301-2048
(404) 331-2954; TDD (404) 331-7816

Region V

Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin

Office for Civil Rights, Region V
U.S. Department of Education
401 South State Street
Room 700C, 05-4010
Chicago, IL 60605-1202
(312) 886-3456; TDD (312) 353-2541

Region VI

Arkansas, Louisiana, Mississippi, Oklahoma, Texas

Office for Civil Rights, Region VI
U.S. Department of Education
1200 Main Tower Building
Suite 2260, 06-5010
Dallas, TX 75202-9998
(214) 767-3959; TDD (214) 767-3639

Region VII

Iowa, Kansas, Kentucky, Missouri, Nebraska

Office for Civil Rights, Region VII
U.S. Department of Education
10220 North Executive Hill Boulevard
8th Floor, 07-6010
Kansas City, MO 64153-1367
(816) 891-8026; TDD (816) 374-6461

Region VIII

Arizona, Colorado, Montana, New Mexico, North Dakota, South Dakota, Utah, Wyoming

Office for Civil Rights, Region VIII
U.S. Department of Education
Federal Building, Suite 310, 08-7010
1244 Speer Boulevard
Denver, CO 80204-3582
(303) 844-5695; TDD (303) 844-3417

Region IX

California

Office for Civil Rights, Region IX
U.S. Department of Education
Old Federal Building
50 United Nations Plaza,
Room 239, 09-8010
San Francisco, CA 94102-4102
(415) 556-7000; TDD (415) 556-6806

Region X

Alaska, Hawaii, Idaho, Nevada, Oregon, Washington, American Samoa, Guam, Trust Territory of the Pacific Islands

Office for Civil Rights, Region X
U.S. Department of Education
915 Second Avenue
Room 3310, 10-9010
Seattle, WA 98174-1099
(206) 553-6811; TDD (206) 553-4542

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